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Law through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights, The

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The Law Through A Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights

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Our California Declaration of Rights, Article I of the California Constitution,[1] has been the subject of continuing interest and increasing controversy in recent decades. Unfortunately, the controversy has not been accompanied by a critical study of the history of that document, and of the sources underlying it. Such attention as has been given to this subject has largely been in service of the "adequate and independent state grounds" doctrine. Supporters of this doctrine, as it emerged in the 1970's, advocated interpretation of the California Constitution--and particularly of the Declaration--so as to depart from the requirements of the United States Constitution, as interpreted by the United States Supreme Court. The most consequential application of this doctrine has been to extend to defendants in criminal cases procedural rights which are more expansive than those mandated by the United States Bill

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The authors gratefully acknowledge the advice of members of the Appellate Division of our Office, and particularly the editorial assistance of Richard E. Nusbaum, law clerk, without whose diligent efforts this Article would not have been published. Any errors are, of course, the responsibility of the authors. On the other hand, whatever errors we may have made, we are--as shall appear below--in fine company.

1. The text of the original 1849 Declaration is set forth in Appendix 1, *infra*.

of Rights. Since the point of the independent state grounds doctrine is to depart from federal precedents as persuasive authority for California law, it is not surprising that the emphasis in both the California high court's opinions and in scholarly comment has been on the *distance* between the California Declaration from the federal charter. In recent years, in fact, some have gone so far as to deny that our California Declaration was based upon the federal constitution at all.

As the California Supreme Court availed itself of "independent state grounds" with increasing frequency to extend more and more rights to criminal defendants, a confrontation developed between the court and the people of California at the polls. Initially, the point of dispute was the death penalty, which the court attempted to abolish in 1972, relying upon the Declaration of Rights. Even when this attempt was overturned by popular vote in 1974, the court, if anything, accelerated its program of relying upon the Declaration of Rights to avoid federal precedents, most notably in regard to the exclusionary rule. This movement in turn engendered increasing popular frustration which erupted in 1982 in the first great climax of this period: Proposition 8, and particularly its Truth-in-Evidence provision which mandated that the exclusionary rule be interpreted according to federal norms. Far from ending the issue, Proposition 8 signaled a heightened level of suspicion and hostility between the court and the voters. This growing antagonism culminated in 1986 with the removal of three justices from the bench and in 1990 with the passage of Proposition 115, the Crime Victims Justice Reform Act, which, among other things, sought to require the court to hue to federal law on a whole range of criminal procedural issues. The court struck down that provision of Proposition 115 in 1991--and already there is talk of more initiatives to come.

This confrontation has left this state and the state supreme court in a long-simmering constitutional dispute. In this Article, we consider both the early history of the California Declaration of Rights and the use that has been made of it in the last couple of decades. In Part I of the Article, we address the arguments of those who have contended that the drafters of the California Declaration

relied upon the constitutions of other states, rather than upon the federal constitution, and who seek to use this to justify departing from federal precedent.[2] We conclude that both the text and history of the Declaration demonstrate that most of the important criminal law provisions were taken from the United States Constitution and were adopted into our state Declaration precisely in order to secure the rights of the federal constitution to Californians. In Part II, we review the recent history of the use of the independent state grounds doctrine by the California Supreme Court to depart from federal authority--and recent popular initiatives which have reversed many of those departures.[3] In light of the history of the Declaration, these recent initiatives directed at "federalizing" criminal procedure, such as Propositions 8 and 115, appear less as assaults upon the "independent vitality" of the Declaration, as such, than as reminders to the judiciary of what the people of this State, both in constitutional conventions and at the ballot box, have long regarded as the true purpose of most of the criminal provisions of the Declaration of Rights.[4]

PART I

THE TEXT AND HISTORY OF THE CALIFORNIA DECLARATION OF RIGHTS

A. Introduction

Before beginning our review of the historical sources of the Declaration, we should mention two caveats at the outset. First, although we have made some effort to trace the provenance of each of the provisions of our original Declaration of Rights,[5] our own focus is very much upon those provisions most salient to the criminal law. We will attempt to remind the reader of this focus

2. *See infra* notes 5-129 and accompanying text.
3. *See infra* notes 130-240 and accompanying text.
4. *See infra* notes 241-248 and accompanying text.
5. *See infra* Appendix I (setting forth the text and history of the original 1849 Declaration).

periodically, but he or she should bear in mind that, unless the context clearly indicates otherwise, our observations are directed to the criminal provisions of the Declaration, only. Second, our review of the history of the Declaration is obviously intended for those for whom the text and history of the constitution are of genuine interest. Those for whom the texts of state and federal constitutions are little more than opportunities for "policy making" or for whom "all law is ideology" will remain unmoved. But, we doubt, for example, that any California Supreme Court justice who has sat on that bench during the past two or three controversial decades would deny the centrality of the text and history of the state constitution to their work. As Professor Leonard Levy--himself a prominent skeptic of the "original intent" school--has eloquently remarked, in the federal context:

> Excepting the scholarly theorists who want the [United States Supreme] Court to reach results of which they approve, no matter whether related to what the Constitution says or what it meant to its Framers, most scholars and probably all judges believe that the task of judging should be as impersonal and objective as humanly possible.[6]

We certainly do not deny the independent power of our state supreme court to depart from the jurisprudence of the United States Supreme Court in its interpretation of parallel state/federal provisions. Nor do we contend that the "original intent" of the drafters of the state constitution requires courts to reach particular results. Nor, again, do we believe that identical wording must always be interpreted identically. We do contend that the drafters' intent, the language of the text and its history should seriously

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6. L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 373 (1988) [hereinafter LEVY, ORIGINAL INTENT]. Professor Levy goes on:

> In constitutional cases, as in any others, the judge who first chooses what the outcome should be and then reasons backward to supply a rationalization replete with rules and precedents has betrayed his calling; he has decided on the basis of prejudice or prejudgment, and he has made constitutional law little more than the embodiment of his policy preferences, reflecting his personal predilections. Result-oriented jurisprudence, whether liberal or conservative, is a gross abuse of judicial office.

Id. Nor, we might add, does it generally achieve the sought-after result--not in California, anyway. *See infra* Part II, *passim*.

inform and restrain the proper interpretation of our state constitution.

B. *The Origins of Our Present Declaration of Rights in the 1849 Constitution*

Most of the provisions of our present California Declaration of Rights go back to our original state constitution, drafted in Monterey in 1849.[7] This is particularly true of the protections most relevant to criminal law and procedure. Although significant changes were made to the jury trial and the grand jury provisions when California adopted its second constitution in 1879, for the most part the delegates to the 1879 convention were satisfied to adopt the provisions of the first constitution. Furthermore, although recent decades have witnessed stylistic revisions and a few substantive changes,[8] the core of the Declaration remains very much as it was originally drafted in 1849.[9] In seeking the provenance of and intentions underlying the Declaration, therefore, the most important sources--in addition to the text itself--are the debates of the 1849 Monterey convention, supplemented by those of the 1879 convention.

The traditional history has long held that the California Declaration of Rights was, as a general matter, created by grafting together portions of the bills of rights of two other states--*i.e.*, that

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7. *See* Appendix I, where we set forth our own provisional conclusions with regard to the provenance and subsequent history of the provisions, both criminal and otherwise, of the 1849 Declaration. In the Appendix, we avoid speaking of the "origins" of provisions or phrases, both because these are often very difficult to determine, and because the issue is not the ultimate origin of a text but the sources to which the drafters looked as authoritative models and what these may reasonably tell us about what they had in mind by adopting--or rejecting--such provisions or phrases. Therefore, we use the word "archetype" to represent the authoritative fount of a textual tradition in question, as it was regarded by the constitutional drafters. Where direct evidence is lacking, we may surmise the probable archetype. On the other hand, by referring to "ostensible sources" we mean the exemplar or "witness" from which the drafters directly worked. In such circumstances, it is to be expected that, where the ostensible sources depart from the archetype, the archetype--to the extent it was regarded as possessed of greater authority--will prevail, and the language of the exemplar will be emended to agree with the archetype, except in purely stylistic respects. *See, e.g.*, our discussion of the California search and seizure provision, *infra* at part I.D.2.

8. *See* discussion *infra* Part II.C.

9. *See infra* Appendix I.

the first eight sections of the Declaration had been taken from the constitution of New York and the others were from the constitution of Iowa.[10] The source of this account was an assertion by one of the most influential delegates at the convention, Mr. William M. Gwin, made during the opening days of the 1849 convention.[11]

With barely a single notable exception,[12] the sources underlying the Declaration hardly witnessed a systematic treatment until the past few years with the publication of Professor Christian G. Fritz's article in the *Hastings Constitutional Law Quarterly* in

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10. At best, authors may acknowledge general and unspecified departures from these models. *See, e.g.*, 2 T. HITTELL, HISTORY OF CALIFORNIA 758 (1897); N. HARLOW, CALIFORNIA CONQUERED: THE ANNEXATION OF A MEXICAN PROVINCE, 1846-1850, at 342 (1982) [hereinafter, HARLOW, CALIFORNIA CONQUERED] (references to origin of Declaration in Iowa and New York constitutions); 6 H. BANCROFT, HISTORY OF CALIFORNIA 296 (1888); David, *Our California Constitutions: Retrospections In This Bicentennial Year*, 3 HASTINGS CONST. L.Q. 697, 712-13 (1976). *See also* R. CLELAND, A HISTORY OF CALIFORNIA: THE AMERICAN PERIOD 252-53 (1923); W. BEAN AND J. RAWLS, CALIFORNIA: AN INTERPRETIVE HISTORY 99 (1988) [hereinafter, BEAN AND RAWLS, CALIFORNIA] (references to Iowa and New York constitutions as sources for California Constitution).

11. Immediately following the initial reading of a draft of the Declaration by the chairman of the Standing Committee on the Constitution, Mr. Myron Norton, the *Report of the Debates* records that Mr. Gwin offered a resolution regarding consideration and printing of the proposals:

> With regard to this resolution, Mr. Gwin would merely state that the first eight sections of the report submitted by the chairman of the Select Committee, were from the Constitution of New York; all the others were from the Constitution of Iowa. There were several manuscript copies of the first part, and printed copies of the last, which would enable the Convention to proceed to business at the hour designated.

J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 31 (1850) [hereinafter BROWNE, 1849 DEBATES]. Mr. Gwin, formerly a member of the House of Representatives, had brought to the convention copies of the Iowa Constitution of 1846, which he distributed to the delegates and advocated as a model for the California Constitution. HARLOW, CALIFORNIA CONQUERED, *supra* note 10, at 341. *Cf.*, R. HUNT, THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846-49), at 56 n.3 (1895) (who almost a century ago expressly pointed out the error of taking Gwin's remark at face value).

12. In 1879, only six months after the conclusion of the constitutional convention of that year, Mr. Robert Desty published THE CONSTITUTION OF THE STATE OF CALIFORNIA ADOPTED IN 1879 WITH REFERENCES TO SIMILAR PROVISIONS IN THE CONSTITUTIONS OF OTHER STATES in November, 1879. It is often described in research library indices merely as a "handbook" of the convention, and no doubt accordingly passed by. Mr. Desty traces parallel provisions in other states' constitutions, and in the federal constitution. Unfortunately, he was apparently left bereft of intellectual heirs, to the point that modern scholars have found it necessary to reconstruct the origins of the constitution *ab initio*. *See* P. MASON, CONSTITUTION OF THE CALIFORNIA ANNOTATED 1403-25 (1946) (for a much later, and less inspired effort).

1989, which he quite candidly and properly characterized as "preliminary."[13]

Most of the other information regarding the origins of the Declaration has taken the form of general historical studies or anecdotal inquiries into particular legal issues. The latter have often consisted of California Supreme Court opinions, the questionable accuracy of which is a major theme of this Article. The purpose of Part I.D and I.E, below, is to examine each of the criminal provisions of the Declaration of Rights in turn.[14] In Part I.D, we consider those which were demonstrably taken from federal sources, usually the United States Bill of Rights. We start with the "criminal safeguards" provision which includes many of the most frequently applicable criminal rights (including right to counsel, due process, jeopardy, etc.)[15] and use this as an opportunity to address the claims of one of the more prominent arguments advanced in recent years in support of reliance upon "independent state grounds." We then proceed to consider the other provisions

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13. Fritz, *More than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13, 15 and *passim* (1989). *See* 1 W. SWINDLER, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 460-61 (1973) (specifying Iowan and federal origins of certain provisions). Our paper is certainly also preliminary and provisional. It is intended as a contribution to a task too long delayed: Much work remains to be done on the text and history of the California Constitution.

14. Some explanation is called for as to why certain of the provisions of the Declaration have not been included here as "criminal provisions." Virtually any of the sections of the Declaration may implicate criminal liability under certain circumstances. As a general matter, the religion clause is not a criminal provision. However, hate crimes certainly infringe upon the rights of individuals to practice freedom of worship. There are also some provisions which might have had some significant potential with regard to criminal procedure, but have not realized that potential. An example is the very first section of the Declaration which provides that: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1. This language, which certainly recalls much of the sweeping invocation of rights in the federal Declaration of Independence, has been essentially a dead letter for at least half a century (except for the 1972 amendment adding "and privacy" to the end of the provision). *See Text of Proposed Law, in* CAL. BALLOT PAMPHLET 26 (Nov. 7, 1972). Before that, it was used largely to strike down economic legislation, etc., during the *Lochner* era. *See* In re Scaranino, 7 Cal. 2d 309, 60 P.2d 288 (1936) (blue law legislation); In re Smith, 193 Cal. 337, 223 P. 971 (1924) (statute limiting employment agency fees); In re McCapes, 157 Cal. 26, 106 P. 229 (1909) (ban on burning brush on private property); Ex Parte Drexel, 147 Cal. 763, 82 P. 429 (1905) (anti-trading stamp act); Ex Parte Hayden, 147 Cal. 649, 82 P. 315 (1905) (act requiring labeling of fruit); Ex Parte Jentzsch, 112 Cal. 468, 44 P. 803 (1896) (blue law legislation).

15. *See infra* notes 30-55 and accompanying text.

of federal origin, search and seizure, habeas corpus, etc. In Part I.E, we consider those criminal provisions of the Declaration which depart from--or are altogether independent of--the federal constitution and consider the recent fate of those provisions before the California Supreme Court.

In order to alleviate confusion, we have ordered each section according to the following chart, numbered in order and describing the provision considered, its original section in the Declaration,[16] and the present location of the provision:

Section of Text and Subject Matter	**1849 Const. Article I**	**Present Const.**
D.1 Criminal Safeguards	Sec. 8	Secs. 7(a), 14 & 15
D.2 Search & Seizure	Sec. 19	Sec. 13
D.3 Habeas Corpus	Sec. 5	Sec. 11
D.4 Bills of Attainder and *Ex Post Facto* Laws	Sec. 16	Sec. 9
D.5 Bail and Cruel or Unusual Punishments	Secs. 6 & 7	Secs. 10[1], 12 & 17
D.6 Treason	Sec. 20	Sec. 18
E.1 Right to Jury Trial	Sec. 3	Sec. 16
E.2 Alternative Prosecution by Indictment or Information	Sec. 8 (1879 Const.)	Secs. 14[1], 14.1 & 23

Before beginning a systematic exposition, though, it is necessary to disabuse ourselves of some of the more extreme--and extremely wrong-headed--views regarding the "independent origins" of our state Declaration of Rights.

16. In all cases but one, the grand jury provision, the original section appeared in the 1849 Declaration.

C. Apocryphal History: The Theory of Separate State Origins

There can be no doubt that the delegates who gathered in Monterey in 1849 paid great attention to the constitutions of other states.[17] It would have been remarkable had they done otherwise. They were, after all, drafting a *state* constitution. In many respects, the states have different structures and different priorities and limitations than does the federal government. Particularly in the nineteenth century, the federal government focussed upon such matters as defense and foreign affairs; whereas, the states were (to an increasing degree as decades passed) concerned with public education and regulation of industry. On the other hand, there certainly were areas in which the interests of California delegates were very similar to those of their federal counterparts. Criminal rights were one such area. In fact, in order to understand the nature of the task of drafting a state bill of rights during this period, it is crucial to remember that the federal Bill of Rights did not then apply to the states--as held in *Barron v. Baltimore*.[18] Therefore, the only way that such rights could be secured for citizens of the states vis-à-vis their state governments was by putting those rights into the state constitutions, themselves.

The basic principle that the drafters of our state constitution looked carefully at other state constitutions in doing their work is therefore not in dispute. Unfortunately, in California this notion has recently been transmogrified into a grand claim that the drafters of our constitution relied on other states' constitutions *instead of* the United States Constitution--that the state constitutions trace their histories back through earlier state constitutions predating the United States Constitution, so that they may lay claim upon priority to, and therefore independence of, the United States Constitution and Bill of Rights. This allegedly separate genealogy has then been used to justify departures from federal interpretations of the United States Bill of Rights on the grounds that our California Declaration

17. At least by the mid-point in the convention the delegates had all 30 of the then-existing state constitutions. *See* BROWNE, 1849 DEBATES, *supra* note 11, at 36.

18. 32 U.S. (7 Pet.) 243 (1833).

of Rights has separate--and, indeed, older--intellectual origins than do the first ten amendments to the United States Constitution.

The most prominent proponent of this particular version of the origins of the state charter has been former California Supreme Court Justice Joseph Grodin, both in his roles as Justice and, more recently, as law professor. As far as we can discover, the first public appearance of Justice Grodin's argument, not yet fully fledged, is in his opinion for the supreme court in *People v. Houston.*[19] In that case, the California court declined to follow the United States Supreme Court's very recent decision in *Moran v. Burbine,*[20] concerning the right of defense counsel to see a suspect who has waived his *Miranda* rights. Much of the opinion of the court consists of a series of exchanges between Justice Grodin, and Justice (now, Chief Justice) Lucas, in dissent. For his part, Justice Lucas objected that:

> As a general rule, I take exception to basing holdings such as this on independent state constitutional grounds where the language of the applicable provisions is almost identical to the federal Constitution, and without some greater showing of an independent state interest needing additional protection.[21]

In response, Justice Grodin pauses at one point and drops the following footnote:

> *The debates at the constitutional convention of 1849 make quite clear that the language of the Declaration of Rights which comprises article I of the California Constitution was not based upon the federal charter at all, but upon the constitutions of other states.* (Reports of the Debates in the Convention of Cal. on the Formation of the State Const. . . . , Sept. 7, 1849, at p. 31.) When the 1849 constitution was adopted, of course, the Fourteenth Amendment to the federal constitution, by which certain federal constitutional rights have been applied to the states, did not yet exist. Indeed, a reading of *both* the 1849 and 1878 constitutional debates reflects a common understanding that it was the *state*

19. 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986).
20. 475 U.S. 412 (1986).
21. *Houston*, 42 Cal. 3d at 624, 724 P.2d at 1185, 230 Cal. Rptr. at 159 (Lucas, J., dissenting).

> constitution, and not the federal, which would protect the rights of California citizens against arbitrary action by the state. (See Debates & Proceedings, Cal. Const. Convention 1878-1879, p. 240; 1849 Debates, Sept. 7-8, 1849, at pp. 30-42.) Thus, we cannot accept Justice Lucas's suggestion that state courts should generally adhere to federal precedent when interpreting *state* constitutions unless, in his ambiguous phrase, there is "some greater showing of independent state interest needing additional protection. . . ."[22]

In 1987, Justice Grodin, after leaving the court, set forth this argument again, in more detailed and mature form, in a speech to the American Judicature Society at the national convention of the ABA. The next year this speech formed the basis of a commentary in the *Hastings Constitutional Law Quarterly*.[23] After a brief synopsis of the events of the first California constitutional convention of 1849, the Justice put forward the argument as follows:

> [F]or the reader interested in the relationship between the California and federal Constitutions, the debate [at the constitutional convention] vividly illustrates two important lessons.
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> The first lesson is that *the language of the California Declaration of Rights was deliberately drawn from the constitutions of other states, not from the language of the federal Constitution. Despite the frequent use of language similar and indeed, in some cases, identical to the federal Bill of Rights, the delegates were not looking to the federal Constitution as their model.* The constitution of New York, which formed the basis for roughly half of the language, was adopted before the federal Constitutional Convention in Philadelphia. [Footnote omitted.] The constitution of Iowa, though adopted after the federal Convention, was an equally independent document. [Footnote omitted.]
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> The second lesson is that, just as the framers of the California Constitution were not looking to the federal Constitution as a model for

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22. *Id.* at 609 n.13, 724 P.2d at 1174 n.13, 230 Cal. Rptr. at 149 n.13 (first emphasis added, others in original).

23. Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 391-402 (1988) [hereinafter Grodin, *Some Reflections*].

> drafting, neither were they looking to it as a legal basis for protecting rights and liberties from interference by the new state.[24]

As noted, Justice Grodin appends two footnotes in the course of his account, the first of which states: "The New York Constitution was adopted in 1777. The Federal Constitutional Convention convened in Philadephia [sic] in May 1787; the document was ratified in 1788."[25] The clear implication is that the delegates at California's 1849 convention were drawing upon provisions of the New York Constitution of 1777, which could not have been based upon the federal constitution because it was *written before* the federal Bill of Rights. Or, as Justice Grodin put it in 1989 in his memoir, *In Pursuit of Justice: Reflections of a State Supreme Court Justice*:[26] "The constitution of New York, which formed the basis for roughly half the language of article 1 [the Declaration of Rights], was adopted before the federal constitutional convention in Philadelphia."[27] In his book, Justice Grodin goes on to conclude that:

> The California constitution is of course not unique. . . . Every state constitution has its roots in the early state constitutions that preceded the [federal] Bill of Rights, and in that historical sense every state constitution is independent of the federal Constitution. . . .

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24. *Id.* at 395 (emphasis added).

25. *Id.* at 395 n.32.

26. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 121-22 (1989) [hereinafter GRODIN, IN PURSUIT OF JUSTICE].

27. *Id.* at 121.

> *The implication of this independence is of tremendous importance to the law. It means that citizens may have greater rights in some respects under the constitution of their state than under the federal Constitution.*[28]
> . . .

* * *

As convincing as this account may sound, it is simply incorrect. It leads one away from the real sources of the criminal provisions of the California Declaration of Rights, rather than towards those sources.

In the first place, the New York Constitution of 1777,[29] which certainly does pre-date the federal constitutional convention (to say nothing of the Bill of Rights), was definitely *not* "the basis for roughly half the language of article 1." In fact, it provides almost no support for Justice Grodin's expansive claims. One will look in vain for mention of most of the Declaration's provisions (at least expressed in anything resembling the language of the California Constitution) in the New York Constitution of 1777. There is no mention of a right not to be "compelled, in any criminal case, . . . to be a witness against himself," nor is there any reference to "due process of law." Neither the word "jeopardy," nor the concept in some other guise, can be found. There is no habeas corpus provision, such as is embodied in section 5 of our 1849 Declaration. There is no guarantee against "excessive bail," or

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28. *Id.* at 122 (emphasis added). Of course, it may also follow that citizens have fewer or narrower rights under the state constitution, than under the federal constitution--a fact too little appreciated and seldom acknowledged by advocates of the "independent state grounds" approach. As a practical matter, it may often (though by no means always) be the case that, even if a court concludes that the state provision is narrower than the federal one, the state may be required to apply the federal right, pursuant to the Supremacy Clause. On the other hand, even this notion of the federal constitution as a "floor" has often been misunderstood or exaggerated. *See* Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS 98, 102-03 (1988) [hereinafter Maltz, *Federalism*]; Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1007-11 (1985) [hereinafter Maltz, *The Dark Side*] (making this point).

29. 7 W. SWINDLER, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 168-80 (1978). *See* B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, part II, at 1328-40 (2nd ed. reprint 1972) (text of 1777 constitution); N. CARTER AND W. STONE, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 2-21 (Albany 1821) [hereinafter NEW YORK DEBATES OF 1821] (reproducing the 1777 constitution).

"excessive fines" and no prohibition of "cruel" and/or "unusual punishments," as set forth in section 6. The New York document does not speak of "the liberty of speech or of the press," as does our article I, section 9. There is a right to jury trial, but it is not expressed in language such as in our Declaration. In fact, of those provisions which supposedly originated in the New York Constitution, only most of one section and one clause of another in the 1777 constitution display language closely parallel to the 1849 California Declaration of Rights (or, for that matter, to the present Declaration): the religion clause, which is section 4 of the 1849 Declaration; and the clause stating that a "party . . . shall be allowed counsel, as in civil actions."

The explanation of all this is simple: Justice Grodin is speaking and writing as if there were a single New York constitution, when in fact there were three during the period at issue: the constitutions of 1777, 1821 and 1846. The delegates to the constitutional convention in Monterey were working from the New York Constitution of *1846*, which resembles the New York Constitution of 1777 only somewhat more than the United States Constitution resembles the federal Declaration of Independence. The analogy is actually a relatively apt one, because the 1777 constitution *is* the New York "declaration of independence." The first portion of the document recounts the reasons for dissatisfaction with the British crown and actually incorporates by quotation the Declaration of Independence of July 4, 1776. Most of the rest of the document consists of fifty-two provisions relating, in large part, to the more mundane requirements of setting up an independent government: the duties of state officials, powers of the legislature, appointment of officials, conditions for impeachment, etc. There is no "declaration" or "bill of rights," as such, in the 1777 New York Constitution.

New Yorkers relatively soon (at least by constitutional standards) found it advisable to draft a new constitution. This they did in Albany, in 1821. Of course, there was also a second motivation recommending the drafting of a new constitution. The Constitution of the United States of America had been ratified in 1787 and its first ten amendments, the federal Bill of Rights,

adopted in 1791. That was about thirty years *before* the drafting of New York's first true bill of rights, which is article VII of its 1821 constitution. This constitution was in turn subject to redrafting at the New York constitutional convention of 1846. In order to appreciate the intellectual origins of our California Declaration of Rights, it is necessary to understand, first, that it was the 1846 New York Constitution (being then quite up-to-date) which our delegates were looking at in Monterey in 1849. Second, the provisions of the 1846 bill of rights for the most part trace their language to the 1821 constitution. Third, as already noted, as far as criminal rights are concerned, the great bulk of constitutional guarantees traceable to the 1821 constitution were in their turn taken from the United States Constitution, as were several provisions taken from the Iowa Constitution of 1846. And fourth, the delegates at our 1849 convention knew full well that they were adopting provisions which in fact came from the United States Constitution and adopted them in large part precisely for that reason.

D. The Federal Origins of the Major Criminal Provisions of the Declaration

1. The Criminal Safeguards Provision

We illustrate our conclusions in this regard by beginning with the so-called "criminal safeguards" provision, which was embodied in section 8 of the 1849 Declaration and in section 13 of the 1879 version. This provision has, since its origin, included many of the most fundamental constitutional rights in criminal law. As set forth in the 1849 constitution, it provided that:

> Sec. 8. No person shall be held to answer for a capital or otherwise infamous crime, (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny under the regulation of the Legislature) unless on presentment or indictment of a grand jury; and in any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. No

> person shall be subject to be twice put in jeopardy for the same offence; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.[30]

In 1879, the provisions for grand jury indictment were changed, and the right to a speedy trial, compulsory process and other rights were added, as discussed below.[31] Although now somewhat dispersed, the individual provisions of the criminal safeguards provision, as adopted in 1849 and amended in 1879, remain integral parts of the California Declaration. Because the criminal safeguards provision contains so many of those rights which commonly impact upon criminal cases, we use it as an exemplar for the origins of the criminal provisions of the Declaration, although we do not rest our thesis upon that provision alone.

The language of the criminal safeguards provision in the 1849 California Constitution is identical to that of the New York Constitution of 1846, being section 6 of Article I, the bill of rights of that document.[32] That language was itself very similar to that of the New York Constitution of 1821, Article VII, section 7, with a few changes in the later document, as set forth in the margin.[33]

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30. 1 W. SWINDLER, *supra* note 13, at 447-48. In comparing the various constitutions, we have generally ignored minor differences in punctuation and capitalization. These habits of orthography vary from decade to decade and document to document. For example, the use of commas and semi-colons varies between the original articles of the constitution and the final engrossed version. *See* Bowman, *The Original Constitution of 1849*, 28 CALIFORNIA HISTORICAL SOCIETY QUARTERLY, no. 3, at 193, 194-95 (1949). For no pressing reason, we have used the spelling, punctuation and capitalization set forth in the final draft of the original constitution. *See* CALIFORNIA STATE DEPARTMENT OF EDUCATION AND THE CALIFORNIA STATE ARCHIVES, THE ORIGINAL OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, 1849 (1965) [hereinafter THE ORIGINAL CONSTITUTION].

31. *See infra* text accompanying notes 45-47.

32. *See* 7 W. SWINDLER, *supra* note 29, at 192-93; B. POORE, *supra* note 29, at 1351.

33. We reprint here the language of the New York Constitution of 1846, italicizing only the words which were not taken from article VII, section 7 of the 1821 constitution and striking out those which were eliminated from the earlier document:

> No person shall be held to answer for a capital or otherwise infamous crime, (except in cases of impeachment, and in cases of ~~the~~ militia when in actual service; and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature,) unless on presentment or indictment of a grand jury; and in ~~every~~ *any* trial ~~on~~

This brings us to our second point with regard to Justice Grodin's argument: the statement that "[e]very state constitution has its roots in the early state constitutions that preceded the Bill of Rights, and in that historical sense every state constitution is independent of the federal Constitution."[34] We do not pretend to have knowledge of "[e]very state constitution;" we are concerned here with the California Declaration of Rights, and, secondarily, with those provisions which California adopted from New York. What we *can* say is that neither the criminal provisions of the California Declaration of Rights, nor those of the New York bills of rights of 1821 or 1846 support Justice Grodin's statement. On the contrary, both the California and New York provisions are "rooted in" the Constitution of the United States, as set forth below. The evidence for this is in those documents' texts and histories, especially in the records of the debates at the respective constitutional conventions.

With regard to those records, we also cannot agree with Justice Grodin that "[t]he debates at the constitutional convention of 1849 make quite clear that the language of the Declaration of Rights which comprises article I of the California Constitution was not based upon the federal charter at all. . . ."[35] In point of fact, the debates show that the delegates, being well aware that the federal constitution did not then apply to the states,[36] in large measure

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~~impeachment or indictment~~ *in any court whatever* the party accused shall be allowed *to appear and defend in person and with* counsel as in civil actions. No person shall be subject ~~for the same offence~~ to be twice put in jeopardy ~~of life or limb~~ *for the same offence*; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

See 7 W. SWINDLER, *supra* note 29, at 187, 192-93. For a possible explanation of the elimination of the "life or limb" language by the New York constitutional convention of 1846, compare the colloquy regarding the same phrase at the 1821 convention. *See infra* notes 43-44 and accompanying text. In addition, the 1846 section seems to differ from the 1821 provision in guaranteeing the defendant a right to "appear and defend" in person and to extend this right and right of counsel to "any court whatever." 7 W. SWINDLER, *supra* note 29, at 187, 192.

34. GRODIN, IN PURSUIT OF JUSTICE, *supra* note 26, at 122.

35. People v. Houston, 42 Cal. 3d 595, 609 n.13, 724 P.2d 1166, 1174 n.13, 230 Cal. Rptr. 141, 149 n.13 (1986).

36. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

dealt with this problem precisely by *adopting* the protections of the federal Bill of Rights into their own charter.

The provenance of the criminal safeguards provision is clearly reflected in the Debates of the 1849 convention. The Chairman of the Standing Committee on the Constitution, Mr. Myron Norton of San Francisco, speaking after the criminal safeguards section was adopted at the convention, first refers to the safeguards provision and then offers an amendment. The following colloquy ensues:

> MR. NORTON. I have another section which I desire to propose in connection with the section just adopted [referring to the criminal safeguards provision]. *That section is from the Constitution of the United States.* The section which I propose is also from the Constitution of the United States, next to it. The first says:
>
> [There follows a quotation of the safeguards provision, in full.]
>
> This does not cover the whole ground; it does not say that he shall have counsel, or that he shall be confronted by two witnesses on compulsory process. . . . The additional section which I propose is as follows:
>
> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district or county wherein the crime shall have been committed; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defence."[37]

There can of course be no doubt about the source of Chairman Norton's proposal--the Sixth Amendment of the United States Bill of Rights.[38] Upon completing his proposal, Chairman Norton is

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37. BROWNE, 1849 DEBATES, *supra* note 11, at 293-94 (emphasis added).

38. The Sixth Amendment states:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

immediately confronted with the following objection from two other delegates:

> MR. SHERWOOD. I think the Legislature would adopt this without any constitutional provision. We are descending too much into detail.
>
> MR. PRICE. It seems to me that we now have more sections in the Bill of Rights than any other State in the Union; and, without giving proper time for reflection, I think it would be inexpedient to introduce this new section in this hurried way. I hope no more new sections will be added. I would greatly prefer striking out some that are already in the Bill of Rights; for instance, *all that are literally from the Constitution from the United States. The people know where to find them if they desire to refer to them.* There is no occasion to have them in the Constitution of California.[39]

To this objection, Chairman Norton responded trenchantly, explaining the purpose of incorporating rights already in the federal constitution into the California Constitution:

> MR. NORTON. *The fact that this is in the Constitution of the United States does us no good here; for it has been decided by the Supreme Court of the United States that these provisions only apply in the United States Courts. It is necessary that we should adopt it here if we desire it to apply in our State courts.* If we have adopted a number of sections that might as well have been left out, it is no evidence against this. They may be unnecessary -- this may be necessary. I deem it of great importance that a provision of this kind should form a part if our fundamental law.
>
> MR. HASTINGS. The section just adopted contains all that is necessary.
> . . .
>
> The question was then taken on the proposed section, and it was rejected. . . .[40]

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have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

39. BROWNE, 1849 DEBATES, *supra* note 11, at 294 (emphasis added).

40. *Id.* at 294 (emphasis added).

Thus, both Norton and his opponents are perfectly well aware that they are arguing about whether to include in the California Constitution two provisions (one, the safeguards provision, already accepted) drawn from the Constitution of the United States. Mr. Norton's point is merely to explain why it is "necessary to adopt [such seemingly duplicative provisions] here."[41]

As noted above, the criminal safeguards provision traces in greatest measure back to the New York Constitution of 1821. We shall therefore look to the debates of that constitutional convention to see what they can tell us.[42] Although we have little in the way of general commentary on the section as a whole, there is at least one illuminating exchange, which occurs early into the debate on the bill, as a series of objections are raised. Suddenly, one Mr. Jacob Radcliff, delegate from New York, raises a concern with regard to the jeopardy clause, which is an integral part of the criminal safeguards provision:

> MR. RADCLIFF wished to know why the expression of life or *limb* was retained. -- Mr. Spencer [Chief Justice of the Court of Appeal] said, *the clause was taken from the amendments to the constitution of the United States*; though it was not expected that the legislature would ever pass laws dismembering a criminal. The expression was rather now retained to designate the offence for which this mode of punishment was formerly enjoined, than as an expression of any punishment that ought otherwise to have been inflicted.[43]

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41. *Id.*

42. *See generally* NEW YORK DEBATES OF 1821, *supra* note 29. As is true of many recorded proceedings of nineteenth century conventions, the *Reports of the Proceedings and Debates of the Convention of 1821* can be relatively cryptic, probably because most of the "action" took place in committee or informally, as is the case in most legislative bodies. But, this does not mean that there is not a good deal to be garnered from such records as these. And, certainly, the opacity of the debates in no way reflects upon the quality of the delegates, which in the case of the 1821 convention included the likes of Chancellor Kent, (later President) Martin Van Buren, New York Chief Justice Ambrose Spencer and Rufus King, co-author of the first federal bill of rights in the Northwest Ordinance of 1787. *See infra* note 92.

43. NEW YORK DEBATES OF 1821, *supra* note 29, at 165 (first emphasis in original, second emphasis added). Mr. Radcliff then offered a substitute which would have eliminated the "life or limb" phrase. This was defeated, but at the subsequent convention of 1846, his view prevailed. *See supra* note 33.

A comparison of the texts of section 7 of the New York bill of rights with the Fifth Amendment confirms the accuracy of the Chief Justice's statement, at least as regards the main body of the provision. The first clause of the provision does differ in certain respects, for reasons largely explained in the debates. The rest of the provision, which remains to this day largely the same in the California Declaration of Rights, is identical to the corresponding portion of the Fifth Amendment, except for the most inconsequential stylistic changes, set forth in the margin.[44]

* * *

It may be objected that the criminal safeguards provision was amended in the 1879 constitution to insert additional provisions. This is true, but the 1879 debates show that, with two notable exceptions, those amendments were motivated precisely by a desire to bring the state constitution into *greater accord* with the federal Bill of Rights by adding federal provisions which had been "overlooked" by the 1849 convention. The two exceptions were the elimination of the right to indictment by grand jury, and the addition of a provision allowing deposition of witnesses in non-homicide criminal cases.[45]

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44. We render in italics language added in the New York version, and strike-out language removed from the federal provision:

> ~~Nor shall any person~~ *No person shall* be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall *he* be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

7 W. SWINDLER, *supra* note 29, at 187. Compare the California language, set forth *supra* text accompanying note 30.

45. These exceptions had the effect of removing the first clause of the 1849 Declaration, regarding grand juries (which subject is then addressed in section 8 of the 1879 Declaration) and of adding the deposition provision as the last clause of the provision. In addition, the eminent domain clause was moved to section 14.

Putting these changes to one side, the rest of the criminal safeguards provision altered the 1849 section as shown below, with new language in italics and language eliminated struck out:

> *In criminal prosecutions,* ~~and~~ in any ~~trial in any~~ Court whatever, the party accused shall ~~be allowed~~ *have the right to a speedy and public trial; to have the process of the Court to compel the attendance of witnesses in his behalf, and* to appear and defend, in person and with counsel ~~as in civil actions.~~ No person shall ~~be subject to~~ be twice put in jeopardy for the same offense; nor ~~shall he~~ be compelled, in any criminal case, to be a witness

The Judiciary Committee of the 1879 convention in its report to the convention added a clause to the criminal safeguards provision which specified a "speedy and public trial," a phrase which is verbatim from the federal Sixth Amendment. The chairman of the Committee on Preamble and Bill of Rights, Mr. Walter Van Dyke, responded to the Judiciary Committee's proposal by offering an amendment of his own, which actually incorporated even more of the federal constitutional language:

> MR. VAN DYKE. I have an amendment, to come in after the word "counsel," which I send up.
>
> The SECRETARY read:
>
> > "To be informed of the nature and cause of the accusation; to be confronted by the witnesses against him, and to have compulsory process for obtaining witnesses in his favor."[46]

Mr. Van Dyke explained his proposed amendment, as follows:

> Mr. Chairman: That amendment is taken from the amendments to the Constitution of the United States, and is to be found in nearly all the State Constitutions. It was substantially the same as reported by the Committee on Preamble and Bill of Rights, but the Judiciary Committee . . . have omitted it. I do not know why they should have omitted it.[47]

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against himself; nor be deprived of life, liberty, or property without due process of law. 1 W. SWINDLER, *supra* note 13, at 471; THE ORIGINAL CONSTITUTION, *supra* note 30, at 54-55.

46. E. WILLIS AND P. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, vol. I, at 343 (1880) [hereinafter DEBATES OF 1878-79]. The corresponding portions of the Sixth Amendment of the Bill of Rights reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

47. *Id.*

Despite Mr. Van Dyke's protestations, he failed to persuade his colleagues to adopt the first clause (regarding the nature and cause of the accusations), although the convention did incorporate the others.

We have now accounted for all of the clauses of the criminal safeguards provision, as they are presently embodied in section 15 of our Declaration of Rights, with the exception of the provision for deposition of witnesses.[48] That clause is genuinely unique and has no federal constitutional equivalent. But it should be noted that the purpose of that clause, as it was added at the 1879 convention, was precisely to protect victims and witnesses from oppression by the judicial system, and to prevent the defeat of justice.[49] This is not the only instance in which we shall see concern on the part of constitutional delegates for the rights of victims and witnesses.[50]

To sum up this portion of the argument, we cannot credit Justice Grodin's assertion that "[d]espite the frequent use of language similar and indeed, in some cases, identical to the federal Bill of Rights, the delegates [at the 1849 convention] were not looking to the federal Constitution as their model."[51] The reason that much of the language of the California Declaration (and of the New York bills of rights) is "similar and indeed, in some cases, identical to the federal Bill of Rights" is because *that is where that language came from.* Furthermore, as the colloquy involving Chairman Norton quoted above illustrates, the point of adopting this language was precisely to secure for Californians the rights guaranteed by the *considerably earlier* federal Bill of Rights, which, as Justice Grodin quite correctly emphasizes, they would otherwise not have had. Once again, this is certainly not to say that the delegates did not study diligently the constitutions of many of

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48. As presently embodied, that clause reads: "The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel." CAL. CONST. art. I, § 15[6].

49. DEBATES OF 1878-79, *supra* note 46, vol. I, at 344. *See id.* vol. III, at 1188-89.

50. *See infra* text accompanying notes 87-88 and note 105.

51. Grodin, *Some Reflections, supra* note 23, at 395; GRODIN, IN PURSUIT OF JUSTICE, *supra* note 26, at 121.

the states, and it is not to deny that there are several unique--or, anyway, nonfederal--elements to our state bill of rights.

In concluding this portion of the argument addressing the criminal safeguards provision, we emphasize that we do not rest our conclusions regarding Justice Grodin's argument upon that provision alone. If in the following discussion we do not again address the details of his claims, this is because we prefer to concentrate on a preliminary reconstruction of the histories of some of the provisions of the California Declaration of Rights which are of greatest importance for the criminal law. We do permit ourselves one final observation on this general topic--concerning the impact that ideas about constitutional origins, unexamined, can have in the real world.

The California Supreme Court recently decided *Raven v. Deukmejian*,[52] in which it struck down a provision of Proposition 115, which might well have amounted to the most sweeping reform in California criminal jurisprudence in the state's history.[53] In the course of determining that the provision in question amounted to an invalid "revision" of the state constitution, the court (in an opinion by the Chief Justice) drew special attention to the historical

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52. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

53. Proposition 115's amendment to section 24 of article I would have required the court to apply in criminal cases federal standards to a whole range of constitutional rights. As amended, the section reads:

> Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.
>
> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

Text of Proposed Law, in CALIFORNIA BALLOT PAMPHLET 33 (June 5, 1990) (emphasis omitted). As such, the provision would have struck at the heart of the "independent state grounds" argument which the California Supreme Court has used for the past two decades to give defendants in criminal cases rights beyond those deemed constitutionally required by the United States Constitution, as interpreted by the United States Supreme Court.

background of our Declaration of Rights, in effect adopting Justice Grodin's argument, in at least one of its dimensions:

> As an historical matter, article I and its Declaration of Rights was viewed as the only available protection for our citizens charged with crimes, because the federal Constitution and its Bill of Rights was initially deemed to apply only to the conduct of the federal government. In framing the Declaration of Rights in both the 1849 and 1879 California Constitutions, the drafters largely looked to the constitutions of the other states, *rather than the federal Constitution*, as potential models. (See e.g., *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1241-1245 [265 Cal.Rptr. 144, 783 P.2d 731]; *Barron v. Baltimore* (1833) 32 U.S. 243, 247-251 [8 L.Ed. 672, 674-675]; Grodin, *Some Reflections on State Constitutions* (1988) 15 Hastings Const. L.Q. 391, 393-397.)[54]

Thus, the court's opinion in *Raven* essentially subscribed to the "separate state origins" argument. It did so, not to establish its *power* to render independent judgment--which was manifest, anyway--but to support the court's ruling as to the issue at hand upon expressly historical grounds. We believe that we have shown that that reliance was misplaced. On the other hand, in recent decades a prudent minority of the court has taken the opposing tack, urging--in the words of the dissent in *Houston*--against "basing holdings . . . on independent state constitutional grounds where the language of the applicable provisions is almost identical to the federal constitution, and without some greater showing of an

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54. *Raven*, 52 Cal. 3d at 352-53, 801 P.2d at 1087-88, 276 Cal. Rptr. at 336-37 (first emphasis added, remainder in original). *Barron v. Baltimore*, of course, merely stands for the historical proposition that the federal Bill of Rights did not then apply to the states. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). The *Raven* court's citation to *Mitchell v. Superior Court* refers to a discussion of the 1879 debates regarding the proper scope of the right to a *jury trial.* As we have already noted and discuss at greater length below, that provision is certainly of non-federal origin. *See infra* notes 95-102 and accompanying text. It does not, however, support the claim that as a general matter "the drafters largely looked to the constitutions of the other states, rather than the federal Constitution, as potential models." *Raven*, 52 Cal. 3d at 353, 801 P.2d at 1087, 276 Cal. Rptr. at 337. We do not suggest that the result in *Raven* would have been different had the court not gotten this issue wrong. On the other hand, it certainly did not help the cause of those supporting the constitutionality of Proposition 115's amendment to section 24.

independent state interest needing additional protection.''[55] It would be unfortunate if recent, erroneous conceptions of the historical origins of the Declaration of Rights were to lead astray those whose prior views reflected a more tempered historical perspective.

2. The Search and Seizure Provision

The ostensible source of the search and seizure provision of the California Declaration of Rights--section 19 of the 1849 Declaration--was the Iowa Constitution of 1846. This provision was later taken over verbatim into the 1879 constitution, and is now section 13 of the Declaration, with only stylistic changes. The provision, as embodied in the 1849 and 1879 constitutions, read as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.[56]

As just mentioned, the Iowa constitution seems to be the exemplar for this section, judging from close identity of language. In fact, the California and Iowa provisions differ by only a single word. But, it is precisely by appreciating the significance of that single word that one may discern the true provenance of our state search and seizure provision, as well as what the drafters had in mind in making that singular change. The Iowa search and seizure

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55. People v. Houston, 42 Cal. 3d 595, 624, 724 P.2d 1166, 1185, 230 Cal. Rptr. 141, 159 (1986) (Lucas, J., dissenting).

56. 1 W. SWINDLER, *supra* note 13, at 448, 471. The present day version of article I, section 13 reads:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13.

provision, article I, section 8 of the constitution of 1846, read as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the *papers* and things to be seized.[57]

The drafters in Monterey changed just one word: They changed "papers" to "persons." We do not believe that this just happened. There is, after all, a big difference between being able to seize "papers" and being able to seize "persons." So, how did it come about that the drafters of the California Constitution decided upon this considerable expansion of the search and seizure power, to encompass not only inanimate objects, but human beings, as well? Where did they get the idea?

One need not look far afield; the Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized.[58]

The search and seizure provision was not among the original group proposed by Mr. Gwin on behalf of the rights committee. It was proposed during the debate, by Mr. Pacificus Ord of Monterey.

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57. IOWA CONST. of 1846, art. I, § 8 (amended 1857) (emphasis added). Swindler misprints this section of his edition of the Iowa Constitution of 1846, so that "persons" is substituted for "papers." *See* 3 W. SWINDLER, SOURCES AND DOCUMENTS OF U.S. CONSTITUTIONS 435 (1974). Poore misprints the entirety of the 1857 Iowa Constitution in place of the 1846 Iowa Constitution. B. POORE, *supra* note 29, at 535-55. He thereby incorporates the same mistake into his edition as does Swindler, since in 1857, the Iowans also changed "papers" to "persons" in their new constitution. In passing, it should also be noted that most of the provisions of the bill of rights of the Iowa Constitution of 1846 were themselves taken over from the abortive 1844 Iowan constitution.

58. U.S. CONST. amend. IV (emphasis added).

Immediately after this provision was offered, the following discussion took place:

> MR. JONES moved to amend the latter part of the amendment by inserting "persons" instead of "papers," so as to read, "and the persons and things to be seized."
>
> MR. HASTINGS presumed it was a mere clerical error. Papers and things would just amount to "things and things."
>
> MR. ORD accepted the amendment.
>
> MR. GWIN said *this section, as amended, was word for word from the Constitution of the United States, 4th article* [sic].[59]

Mr. Gwin's statement is not literally correct, of course. There are differences, albeit of a purely stylistic nature, between the wording of the provision adopted by California and the Fourth Amendment. California uses "seizures and searches," rather than "searches and seizures," as does the federal Bill of Rights. California uses a singular, "warrant," rather than "warrants," and speaks of "persons *and* things," instead of "persons *or* things," as does the federal version. But, what really emerges from this account of the debates is a conscious effort to bring the California "search and seizure" provision into substantive accord with the federal standard. The distinctions that remained were purely stylistic.[60] Thus, the authors of our Declaration of Rights changed the Iowa "draft" so that it would mirror the Fourth Amendment of the federal constitution. In its substance, then, section 19 of the

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59. BROWNE, 1849 DEBATES, *supra* note 11, at 47-48 (emphasis added).

60. The only dispute with this statement of which we can reasonably conceive concerns that most slippery of little words, "or." That is, it might be maintained that the change from "or" to "and" in the language of the California search and seizure provision changes the substantive meaning of the provision. Such a change certainly can have this effect. *See* our discussion of "cruel or unusual punishments," *infra* text accompanying notes 77-85. But, in this case, it has no such effect--unless one is willing to urge that a choice has to be made as to each warrant: you can seize "persons" or "things," but not both. What about the items in the suspect's pockets, or the pockets' pants? Can you seize him, but not them? Why not just have two identical warrants, except that one describes the suspect and the other the things? But why waste the trees? The argument just does not hold water.

California Declaration of Rights *equals* the Fourth Amendment of the United States Constitution.[61]

3. The Great Writ

The writ of habeas corpus was of imposing consequence to the drafters of the 1849 constitution, and the energy of their debate reflects this.[62] The initial proposal offered at the convention of 1849, was: "IV. The privileges of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension."[63] One delegate, Mr. Charles T. Botts, a lawyer and magazine editor from Virginia,[64] proposed to add "in the opinion of the Legislature" after "public safety," and justified his proposal in part thus:

> [H]e begged that gentlemen would consider for a moment what they were doing. Did they know what it was to suspend the writ of *habeas corpus?* -- to declare martial law, and leave the power in the hands of a single individual? It is nothing less than to make a Dictator of that individual. He can at his will and pleasure arrest citizens of the State. . . . You disfranchise every man. . . . Is it the desire of gentlemen to place their constituents in this position?[65]

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61. Furthermore, attempts to do an "end-run" around the federal Bill of Rights by seeking to trace the provision through pre-1791 state constitutions fail. First, search and seizure provisions of the latter sort were of recent vintage in the late eighteenth century. Although some earlier state constitutions had such clauses, the Fourth Amendment was original in respects which are fundamental to our modern notion of search and seizure law. Furthermore, the earlier provisions, such as those in Virginia and Maryland, typically stated that general warrants "ought" not to issue. *See* 5 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 259 (1987). On the one hand, the Fourth Amendment for the first time made the injunction emphatic--"shall"--while on the other hand introducing the notion of "probable cause," as the regulator of the provision. "Probable cause" is now, of course, the central conception of modern search and seizure law. As one scholar of the Fourth Amendment has remarked, "[t]he ideas comprising the Fourth Amendment reversed rather than formalized colonial precedents. Reasonable search and seizure in colonial America closely approximated whatever the searcher thought reasonable." LEVY, ORIGINAL INTENT, *supra* note 6, at 224 (quoting William Cuddihy, The Fourth Amendment: Origins and Original Meaning, chapt. 7 (Ph.D. dissertation, Claremont Graduate School, manuscript-then-in-progress)). *See id.* at 242-46.

62. BROWNE, 1849 DEBATES, *supra* note 11, at 39-41.

63. *Id.* at 30. Note the use of the plural, "privileges," which did not survive in the final draft.

64. W. HANSEN, THE SEARCH FOR AUTHORITY IN CALIFORNIA 103 (1960) [hereinafter HANSEN, SEARCH].

65. BROWNE, 1849 DEBATES, *supra* note 11, at 40.

Thus challenged, two prominent members responded as follows:

> MR. GWIN read from the Constitution of the United States the following clause:
>
> > "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."
>
> MR. SHANNON thought the gentleman's principles (Mr. Botts') beautiful enough in theory, but he was afraid they would be found rather inconvenient in practice. . . . *Above all, it is a provision of the Constitution of the United States.*[66]

Mr. Botts' motion to amend the provision failed, as did another, similar amendment. The provision was later adopted, in the form originally proposed--which differs from the federal provision only in matters of style, as does our present provision.[67]

4. Bills of attainder, ex post facto laws, etc.

Section 16 of the 1849 Declaration provided that: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."[68] This language is taken verbatim from the Iowa Constitution of 1846, but it also closely resembles

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66. *Id.* (first emphasis in original, second emphasis added). We have already met Mr. Gwin, the original proponent of much of the substance of our Declaration. Mr. Gwin would later become one of California's first United States Senators. BEAN AND RAWLS, CALIFORNIA, *supra* note 10, at 121. *See generally* HANSEN, SEARCH, *supra* note 64, at 103-104. Mr. Shannon was a Sacramento lawyer and former military officer, who would be remembered for introducing section 18 of the Declaration, which prohibited slavery. *Id.* at 102.

67. Lest anyone question whether the small difference in wording between the California and federal versions might reflect origins other than the federal Bill of Rights, we would point out that our state's habeas corpus clause is identical to that adopted in the New York Constitution of 1821, and that the 1821 provision as initially proposed at that convention was identical to that of the United States Constitution, Article I, section 9(2), except in being preceded by a "that": "That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." NEW YORK DEBATES OF 1821, *supra* note 29, at 102. The original wording was kept in the 1879 constitution. The present provision (as reworded in 1974) is section 11 of the Declaration and reads: "Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." CAL. CONST. art. I, § 11.

68. THE ORIGINAL CONSTITUTION, *supra* note 30, at 58.

language in the federal constitution. The federal charter actually speaks to the issue at hand twice in its First Article. With regard to the federal government, it states in section 9[3] that: "No Bill of Attainder or ex post facto Law shall be passed."[69] Section 10[1] provides in relevant part that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ."[70]

At the 1879 convention the initial proposal by the Committee on Preamble and Bill of Rights amended this provision, adding the phrase, "or the remedy for the enforcement or breach thereof," at the end of the "contracts" clause. This proposed amendment was opposed, as follows:

> MR. WINANS. Mr. Chairman: I hope this Convention will adopt as a cardinal rule of procedure that amendments to the present Constitution in all cases, except where the wishes of the people and the exigencies of the times demand a change, shall not be adopted. Now, sir, *the Constitution as it stands in this case in reference to this question is identical with the provisions of the Constitution of the United States,* which says: "Congress shall pass no bill of attainder, ex post facto law, or law impairing the obligation of a contract." But the words proposed to be introduced here have a very doubtful meaning. . . . I am opposed to the section as advocated by the Committee on Preamble and Bill of Rights.[71]

Whereupon, the proposal to amend the provision was rejected. Except in style, the language of this provision has remained the same to this day.[72]

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69. U.S. CONST. art. I, § 9[3].

70. U.S. CONST. art. I, § 10[1].

71. DEBATES OF 1878-79, *supra* note 46, vol. I, at 268 (emphasis added).

72. As presently embodied in article I, section 9, the provision reads: "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." CAL. CONST. art. I, § 9.

5. *The Bail Provisions and the "Cruel or Unusual Punishments" Clause*

The issue of bail in criminal cases (along with several other issues) was dealt with in two provisions, sections 6 and 7, of the 1849 Declaration, later combined in the 1879 constitution. The two sections read as follows:

> Sec. 6. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.
>
> Sec. 7. All persons shall be bailable, by sufficient sureties: unless for capital offences, when the proof is evident or the presumption great.[73]

These two sections must be addressed separately, because their derivations, to the extent that they can reasonably be made out, are separate.

a. Section 6

With regard to section 6, as it was originally presented to the 1849 convention, the California Supreme Court has correctly observed, that "[b]ut for the addition of the 'witness' clause, the proposed section was identical to the Eighth Amendment to the United States Constitution."[74] Furthermore, the language of the proposed section--including the "witness" clause--came verbatim from the New York Constitution of 1846. Unfortunately, neither the California debates nor the 1846 New York debates address the source of the "excessive bail [or] fine" clauses of this section. But, in light of all that we have seen up until this point, regarding the attention paid to the federal constitution in regard to criminal

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73. THE ORIGINAL CONSTITUTION, *supra* note 30, at 53. *See* 1 W. SWINDLER, *supra* note 13, at 447.

74. People v. Anderson, 6 Cal. 3d 628, 634-35, 493 P.2d 880, 884, 100 Cal. Rptr. 152, 156 (1972).

provisions, and in light of the identity of language with the United States Constitution, we do consider it appropriate that those who advocate an independent or separate state source for those clauses ought to bear the burden of establishing that the drafters had something else in mind when they chose this language other than adopting the federal right into the state charter.[75]

On the other hand, this still leaves two important areas of this provision unaccounted for, since they certainly do differ from the federal version. As noted, one is the "witness" clause, which we discuss below.[76] The other is the "cruel *or* unusual punishments" clause, which attracted much attention as a result of being relied upon by the California Supreme Court to declare the death penalty unconstitutional under the California Constitution in *People v. Anderson*[77] in 1972.

In *Anderson*, the court first stated its conclusion--that "capital punishment is both cruel and unusual as those terms are defined under article I, section 6, of the California Constitution"[78]--and then set about trying to show that, as a historical matter, the "cruel or unusual" language of the California document was intended to have a different meaning from the "cruel *and* unusual" language of the Eighth Amendment to the federal constitution, and that that meaning supported the holding of the court, banning the death penalty.[79] It is with that historical argument that we are concerned now.

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75. This is not to assert that the drafters *could not* have taken this language from another source; on the contrary, this language was already relatively ancient and well-known when the federal document was drafted. As noted in a recent United States Supreme Court opinion, it comes from the English Bill of Rights of 1689, which provided "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." Harmelin v. Michigan, 111 S. Ct. 2680, 2687 (1991) (quoting the English Bill of Rights of 1689). Regarding the history of the provision, compare the "duelling opinions" by Justice Scalia and Justice White. *Id.* at 2684-702 (Justice Scalia), *and id.* at 2709-19 (Justice White).

76. *See infra* text accompanying notes 87-88.

77. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

78. *Id.* at 633, 493 P.2d at 883, 100 Cal. Rptr. at 155.

79. One cannot help but wonder, if the court concluded that capital punishment was "*both* cruel *and* unusual" (as it said it did) why it was necessary to show that it was "cruel *or* unusual" under the California Constitution, except in order to prevent the United States Supreme Court, which was at that same time considering the same issue, from reversing the California court. *See generally* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972).

Chief Justice Wright's opinion for the court begins with a detailed discussion of the debates at the constitutional convention of 1849, with one major oversight discussed below. He cites repeatedly to the Reports of the Debates. He notes correctly that the section as originally introduced was consistent with the federal (and the New York) language, stating that "cruel and unusual punishments" shall not be inflicted. And, he rightly observes that during the course of the convention the delegates gained access to all the other state constitutions, several of which included the "cruel or unusual" wording. Moreover, it is reasonably certain that this change was a last minute alteration. Although not noted by the court in *Anderson*, a published facsimile of the final draft of the articles of the 1849 constitution shows that in section 6, an emendation has been made, in which the "and" between "cruel" and "unusual" has been crossed-out and a carrot inserted pointing up to an "or," seemingly written in a different hand, more or less thus:

or
. . cruel^~~and~~ unusual punishments. . . .[80]

This is presumably the manuscript origin of the difference in phrasing. That the change was made at the last moment does not imply that it was necessarily unimportant, by any means. We simply have no record of any discussion or debate that might have gone into making the change. We do not know. On the other hand, the court's conclusion in *Anderson* that "the delegates . . . were aware of the significance of the disjunctive form and that its use was purposeful"[81] certainly makes some sense.

What does *not* make any sense is the second half of the court's historical argument--that this change from "and" to "or" provides historical support for their conclusion that capital punishment violates the California Constitution. Given the rather embarrassing absence of any supporting evidence for its position, the court seems

80. THE ORIGINAL CONSTITUTION, *supra* note 30, at 53.
81. *Anderson*, 6 Cal. 3d at 634, 493 P.2d at 883, 100 Cal. Rptr. at 155.

to have been satisfied to respond to the argument by the Attorney General in *Anderson* that various phrases in other portions of the California Constitution *presume* the presence of capital punishment, as did a then-recent constitutional revision in Proposition 1-a in 1966:

> To interpret the adoption of Proposition 1-a or the presence in other provisions of the Constitution of references to capital punishment as intended to bar future judicial consideration of the possible cruel or unusual nature of capital punishment would violate the most elementary rules of constitutional construction. "We do not . . . approve of that principle of constitutional construction, which seeks by vague surmises, or even probable conjecture, or general speculation of a policy not distinctly expressed, to control the express language of the instrument; *since such a mode would not unfrequently change the instrument from what its framers made it, into what the Judges think it should have been.*" (*People* v. *Weller* (1858) 11 Cal. 77, 86.) *The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision* solely because at a time when the death penalty was commonly accepted they provided elsewhere in the Constitution for special safeguards in its application.[82]

What is remarkable about this passage, coming in an opinion which is so expressly founded upon examination of the Debates at the constitutional conventions, is that it manages to overlook the fact that the delegates in 1849 forthrightly considered a constitutional amendment stating that capital punishment violated the provision in question in the course of their debate, and *overwhelmingly rejected it*:

> MR. HASTINGS moved the following as an additional section [to the Declaration of Rights]:
>
> > As the true design of all punishment is to reform and not to exterminate mankind, death shall never be inflicted as a punishment for crime in the State.

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82. *Id.* at 639, 493 P.2d at 887, 100 Cal. Rptr. at 159 (emphasis added).

> MR. HASTINGS. I do not know, sir, what favor this question may meet with here -- whether it will have a single supporter but myself. It has, however, found many supporters . . . in every State of the Union. And, sir, the time is fast approaching when this great principle will be engrafted into the laws of all the different States. My opinion is, that this new State should adopt it, and that it should be incorporated in the bill of rights.[83]

As Professor Fritz has noted, "[a]lthough one delegate half-heartedly seconded consideration of Hastings' proposal, the convention--with no recorded debate--quickly rejected making the death penalty unconstitutional."[84] Similar amendments were offered--and defeated--at both the New York and Iowa constitutional conventions of the 1840's.[85]

It is one thing for judges to make the law "into what [they] think it should have been" when the original intent of the drafters of a constitution cannot be reasonably inferred; it is quite another to act in contradiction of the drafters' intent while passing over their views in silence. In any case, as we shall discuss below, *Anderson* was overruled by initiative only two years after it was decided.[86]

The final clause of section 6 of the 1849 Declaration provided, "nor shall witnesses be unreasonably detained."[87] This passage has no federal counterpart and is interesting for its reflection of concern about the fates of victims and witnesses, a matter also of

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83. BROWNE, 1849 DEBATES, *supra* note 11, at 45.

84. Fritz, *supra* note 13, at 27-28. Nor is much to be accomplished by examination of the 1879 Debates. As the court itself opined, "[w]e find no indication in the Debates and Proceedings of the Constitutional Convention of 1878-1879 that the delegates to that convention intended any change in the meaning of the section. To the contrary . . . ." *Anderson*, 6 Cal. 3d at 637 n.18, 493 P.2d at 885 n.18, 100 Cal. Rptr. at 157 n.18.

85. In New York, the proposal seems to have died in committee. *See* W. BISHOP AND W. ATTREE, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, at 105 (Albany 1846) [hereinafter NEW YORK DEBATES AND PROCEEDINGS OF 1846]; regarding Iowa, *see* B. SHAMBAUGH, FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846 ALONG WITH PRESS COMMENTS AND OTHER MATERIALS ON THE CONSTITUTIONS OF 1844 AND 1846, at 161 (1900).

86. *See infra* text accompanying notes 144-147.

87. THE ORIGINAL CONSTITUTION, *supra* note 30, at 53. The clause is now the first sentence of section 10 of the Declaration, and reads: "Witnesses may not be unreasonably detained." CAL. CONST. art. I, § 10[1].

considerable interest in recent times. As mentioned earlier, the clause comes verbatim from the New York Constitution of 1846. The debates of 1846 show General Tallmadge, recounting some of the abuses common in the era, including instances in which victims of serious crimes such as rape were confined for long periods, while the perpetrators were allowed to go free on bail.[88] While abuses of this degree are largely a thing of the past, it is a testament to the concern for the treatment of victims and witnesses that the drafters of both the New York and California Constitutions would incorporate provisions such as this one into their bills of rights.

b. Section 7

Section 7 of the 1849 Declaration also addressed the bail issue and so was later merged with the section discussed above into section 6 of the 1879 Declaration. Although it was taken in slightly modified form from the Iowa Constitution and finds no parallel in the United States Constitution, it *is* actually of federal origin. Like section 18 of the 1849 Declaration, which outlawed slavery in California, its unique language comes from the Northwest Ordinance of 1787.[89] This document, which was drafted by the Confederation Congress and was the first federal document to contain a bill of rights, "established a model for territorial governance and the admission of other states in the American

88. As General Tallmadge recites one such instance:

> Three villians committed a rape upon a woman, just north of the city of Albany, in what are called the Patroon's woods. She was a cook upon one of the canal boats, and was therefore considered by the magistrate a transient person; and upon her entering complaint against the villians, she was committed to the jail in this city, while the rascals were enabled to obtain bail, and had never been brought to trial. That poor woman lay in jail *fifteen months*, and until . . . she was at length set at liberty.

NEW YORK DEBATES AND PROCEEDINGS OF 1846, *supra* note 85, at 539.

89. *See* L. Levy, *Northwest Ordinance (1787)*, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1329 (1986) (observation of Professor Levy) ("[I]n a precedent-making clause [the Ordinance] declared, 'There shall be neither slavery nor involuntary servitude' in the Northwest Territory or states formed from it."). *Cf.* CAL. CONST. OF 1849, art. I, § 18 (now embodied in section 6 of article I).

West."[90] It is not surprising therefore that its language was familiar to the 1849 drafters.[91] As set forth in the Ordinance, the provision stated that: "All persons shall be bailable unless for capital offences, where the proof shall be evident, or the presumption great. . . ."[92]

6. Treason

Though very rarely cited, the debate on the "treason" provision (section 20 of the 1849 Declaration) is briefly addressed here because it is a criminal provision, certainly, and because it carries forward the prior theme. Upon the section being proposed, the wording of the provision was identical to that in the federal constitution, except in referring to the "state":

> Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.[93]

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90. L. Levy, *Northwest Ordinance (1787)*, *supra* note 89, at 1329.

91. Unlike those provisions taken from the federal constitution, there is no explicit indication in the Debates that the drafters were aware that the provision came from the Northwest Ordinance. On the other hand, they may well have been. For instance, the rights guaranteed by the Northwest Ordinance, including this provision, applied to Iowans until the adoption of its 1846 constitution and must therefore have been known to them, as well as to the drafters of the constitutions of other western states. *See* B. SHAMBAUGH, HISTORY OF THE CONSTITUTIONS OF IOWA 105-120 (1902).

92. 1 W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS: NATIONAL DOCUMENTS 1492-1800, at 387-388 (Second Series 1982). *See* F. WILLIAMS, THE NORTHWEST ORDINANCE, ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY 124 (1989). It should be noted that similar language was originally proposed but rejected at the New York debates of 1821. *See* NEW YORK DEBATES OF 1821, *supra* note 29, at 103, 169. That such similar language was proposed is not surprising, both because more than 30 years had elapsed since the Ordinance, and because one of the two primary drafters of the Northwest Ordinance, Rufus King, also held a prominent position at the 1821 convention. *See* Levy, *supra* note 89, at 1329; NEW YORK DEBATES OF 1821, *supra* note 29, at 28, 38.

93. THE ORIGINAL CONSTITUTION, *supra* note 30, at 59-60. *See* 1 W. SWINDLER, *supra* note 13, at 448. The same language was taken over in the constitution of 1879. It remains the same today as section 18, with only stylistic changes made in 1974:

> Treason against the State consists only in levying war against it, adhering to its enemies, or giving them aid and comfort. A person may not be convicted of treason except on the evidence of two witnesses to the same overt act or by confession in open court.

CAL. CONST. art. I, § 18.

Mr. Botts (whom we met earlier complaining about the habeas corpus section) objected:

> MR. BOTTS proposed to strike out the latter clause, commencing "No person shall be convicted of treason," &c. He thought treason should stand on the same footing with any other crime . . . . It is a strong incentive to crime to say in this Constitution, that treason, the greatest of crimes, shall have this advantage over all others; and that the prisoner may go scot free, unless this provision is complied with. He (Mr. Botts) would read a sentence from Blackstone in relation to the punishment of high treason.
>
> MR. GWIN *considered the Constitution of the United States better authority than Blackstone.*
>
> The question was then taken on the amendment of Mr. Botts, to strike out the latter clause, and decided in the negative.
>
> The original amendment was then adopted.[94]

E. *Non-Federal Provisions and Their Strange Histories*

1. *The Jury Trial Provision*

The right of trial by jury is another provision of the Declaration of Rights--which, by the way, was called the "*Bill* of Rights" until the word "Bill" was scratched out and replaced in the final version[95]--with obvious implications for the criminal law. In this case, though, we are dealing with a provision which has no close parallel in the federal constitution. In the 1849 constitution, the provision, section 3, read:

> The right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.[96]

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94. BROWNE, 1849 DEBATES, *supra* note 11, at 48 (emphasis added).
95. THE ORIGINAL CONSTITUTION, *supra* note 30, at 51.
96. *Id.* at 52. *See* 1 W. SWINDLER, *supra* note 13, at 447.

This is also how it read in the version originally proposed by Mr. Gwin, who stated that it came from the New York Constitution.[97] As a matter of fact, though, Mr. Gwin's assertion is not entirely correct. Much of the provision does certainly seem to be derived from Article I, Section 2 of the New York Constitution of 1846. The New York version read:

> The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury-trial may be waived by the parties in all civil cases in the manner to be prescribed by law.[98]

It will be noted that the two provisions are very similar; indeed, the second clause and the last portion of the first ("and remain inviolate forever") are virtually identical. But the initial clause is different: the New York version rather ploddingly recounts that they will go on using jury trials in the same way they have in the past, and not otherwise; but the California version, with seemingly grander sweep, assures that the "right of trial by jury shall be *secured to all. . . .*"[99]

This initial clause is also the only part of the jury provision which survives in the present Declaration of Rights. The second clause was altered substantially, and after long and rancorous debate, by the convention delegates in 1879.

We have here language which is unique, at least in the sense that it differs not only from the United States Constitution, but also from its direct model, the New York jury trial provision. Moreover, there seems to be no record of whatever deliberations (if any) went into drafting it.

We can, nonetheless, reasonably draw a couple of conclusions. First, it must have been intended to mean something *different* from what the New York version meant. Otherwise, there would seem to have been no reason to redraft the language, changing the historical test ("in which it has been heretofore used") to such a

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97. BROWNE, 1849 DEBATES, *supra* note 11, at 30-31.

98. 7 W. SWINDLER, *supra* note 29, at 192.

99. All *what* remains unclear. All persons? All cases? All criminal cases? Compare the second clause, distinguishing civil cases.

more general injunction ("secured to all"). Second, is precisely the point that what we have here is a general injunction, casting aside the limitations of the New York Constitution. It is therefore logical to conclude that the California right was meant to be more expansive than the New York variety--or, for that matter, than the corresponding federal version.

So, what has the California Supreme Court made of this? Essentially, the court has given this seemingly expansive provision about as restrictive a meaning as the words will bear. Indeed, their interpretation corresponds, no doubt unintentionally but with uncanny precision, with the only interpretation that can definitely be *eliminated* as the meaning of the provision--namely, the New Yorkers' intention that the right be limited to those "cases in which it has been heretofore used."

The established rule in California is that the right to jury trial does not extend to offenses to which it was not applicable at the time of the adoption of the California Constitution. In the leading case, *People v. One 1941 Chevrolet Coupe*,[100] the supreme court held that:

> "The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted. The common law at the time the Constitution was adopted includes not only the *lex non scripta* but also the written statutes enacted by Parliament. The common law respecting trial by jury as it existed in 1850 is the rule of decision in this state."[101]

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100. 37 Cal. 2d 283, 231 P.2d 832 (1951).

101. *Id.* at 286-87, 231 P.2d at 835 (citations omitted) (the court, with some deletions and additions, adopted the opinion of the district court of appeal). Or, as the court stated more recently, in *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978):

> The right to a jury trial is guaranteed by our Constitution. We have long acknowledged that the right so guaranteed, however, is the right as it existed at common law in 1850, when the Constitution was first adopted, "and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact."

Id. at 8, 587 P.2d at 1139, 151 Cal. Rptr. at 326 (citation omitted). *Accord* Crouchman v. Superior Court, 45 Cal. 3d 1167, 1173-74, 755 P.2d 1075, 1077-78, 248 Cal. Rptr. 626, 628-29 (1988).

This rigid historical principle has since been confirmed in a variety of contexts, both civil and criminal, by the California courts of appeal.[102]

2. *The 1879 Reforms to the Grand Jury System*

As with the reforms to the jury trial right, the grand jury system was the subject of great controversy at the 1879 convention. In fact, this provision probably occupied as much time at the convention as any other in the whole constitution. Here too, the reformers deliberately departed from the federal model. Here too, their efforts have recently been poorly served by our state supreme court.[103]

As noted above, the delegates at the 1849 convention had adopted the federal rule that no one was to be "held to answer for a capital or otherwise infamous crime . . . unless on presentment or indictment of a grand jury."[104] In the years following the ratification of the first constitution, this requirement gave rise to considerable dissatisfaction, on account of the expense and oppression it occasioned. Consequently, many of those who gathered at the 1879 convention wished to abolish the system altogether. Others wished to preserve it. Amongst the former, the grand jury system was denounced as favoring the rich, as tending to undermine responsibility by diffusing it among many jurors, and as generally antiquated: "Institutions with no other recommendation than age had better fall and be buried in the

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102. United States Fidelity & Guaranty Co. v. Superior Court, 204 Cal. App. 3d 1513, 1529, 252 Cal. Rptr. 320, 330 (1988) (regarding declaratory relief); People v. Oliver, 196 Cal. App. 3d 423, 429-30, 241 Cal. Rptr. 804, 806-08 (1987) (regarding jury procedures in a criminal trial); People v. Anderson, 191 Cal. App. 3d 207, 219-20, 236 Cal. Rptr. 329, 337-38 (1987) (regarding an infraction under the Agricultural Code); A-C Co. v. Security Pacific Nat. Bank, 173 Cal. App. 3d 462, 472-73, 219 Cal. Rptr. 62, 68-69 (1985) (regarding the legal-equitable distinction). *See also* People v. Oppenheimer, 42 Cal. App. 3d Supp. 4, 8, 116 Cal. Rptr. 795, 798 (1974) (regarding a traffic infraction). *Cf.* In re Javier A., 159 Cal. App. 3d 913, 927-29, 206 Cal. Rptr. 386, 394-96 (1984) (urging that jury trials be given minors, based on the claim that such was the law in England in 1850).

103. *But see infra* note 129.

104. THE ORIGINAL CONSTITUTION, *supra* note 30, at 54; 1 W. SWINDLER, *supra* note 13, at 447-48.

closets of the past."[105] On the other side, it was urged that both the United States Constitution and the existing (1849) constitution provided for indictment by a grand jury and that it was dangerous to the rights of innocent persons to permit prosecution for a felony on the basis of one person's decision, whether that person be a prosecutor or a magistrate.[106] In the event, neither side prevailed.

After extended argument, the opposing sides reached a compromise, which allowed continuance of the grand jury system but also permitted *the legislature* to provide for an alternative system of prosecution:

> It is the proposition of the Judiciary Committee that this whole matter be delegated to the Legislature, after providing that at least one Grand Jury shall be drawn per annum. It leaves the power of prosecution by indictment or presentment -- information it is called here -- to the discretion of the Legislature. They can restore it as a whole and leave out the word "information," or they can follow out the plan indicated here, and prosecute by both indictment and information.[107]

Accordingly, as adopted in the 1879 constitution, section 8 read:

> Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county.[108]

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105. DEBATES OF 1878-79, *supra* note 46, vol. I, at 313 (Mr. Beerstecher). In another illustration of concern for victims and witnesses, an opponent of the existing system complained that:

> Under the present system, in cases of the commission of crime, those of the people who are known to be cognizant of it are first compelled to appear before the committing magistrate as witnesses. They are again compelled to appear before the Grand Jury and in many cases having to travel a long distance to the county seat, . . . and finally, when the case comes up for trial, they are again subjected to the same hardship.

Id. at 314 (Mr. Huestis).

106. *Id.* at 308-09. *See id.* vol. III, at 1177.

107. *Id.* vol. I, at 318.

108. 1 W. SWINDLER, *supra* note 13, at 470.

This system survived for 99 years. Certain amendments to section 8 were passed in 1934, prescribing that a defendant be provided with a copy of the complaint which should in turn be read to him upon request, and that he be informed of and given an opportunity to exercise his right to counsel--rights which remain in the Declaration today. But none of these amendments materially altered the grand jury system. Again, in the early 1970's, the Constitutional Revision Commission recommended a variety of simplifications and changes to the constitution, discussed at greater length below; but they expressly declined to alter the grand jury, finding that this was appropriately the task of the legislature.[109] As adopted by the California voters in 1974, the grand jury procedure was retained intact, except that the state legislature was allowed to arrange to call a grand jury more often than previously.[110]

The case law also consistently supported the system of alternative prosecution by either indictment or information. During the early period, the most prominent attack on the system came from those who insisted that they had a right to indictment by grand jury--that a preliminary hearing was constitutionally inadequate. This argument was rejected by the United States Supreme Court in 1884,[111] and this rule remains the law of the

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109. In his dissent in *Hawkins v. Superior Court*, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978), Justice Richardson quotes from the Commission's report, as follows:

> "Existing Section 8 contains extensive provision for criminal indictment procedures. . . . [¶] Indictment procedures are significant because they assure certain guarantees to all those accused of crimes. Although much of the procedural material in existing Section 8 is recommended for transfer to statutes, the Commission feels that retention of some basic provisions is warranted and desirable. [¶] . . . . The entire grand jury system has many deficiencies which should be corrected. *The Commission believes that the Legislature is best equipped to reform this system* and that reform should not be hampered by unnecessary constitutional restrictions."

Id. at 613, 586 P.2d at 935, 150 Cal. Rptr. at 454 (quoting CAL. CONST. REVISION COM., PROPOSED REVISION OF THE CAL. CONST., pt. 5, at 22 (1971)) (emphasis in opinion).

110. As described by the Legislative Analyst:

> **Grand Juries.** Presently the Constitution requires each county to summon a grand jury once each year. Without changing that requirement, this proposition allows the Legislature to provide for summoning more than one grand jury each year.

Office of the Secretary of State, *in* CALIFORNIA VOTERS PAMPHLET 26 (November 5, 1974) [hereinafter VOTERS PAMPHLET].

111. Hurtado v. California, 110 U.S. 516, 538 (1884).

land today. Attacks upon indictment by grand jury were similarly rejected by the California Supreme Court.[112] As late as 1972, Justice Mosk, writing for a unanimous court in *People v. Sirhan*,[113] expressly rejected constitutional attacks upon the grand jury system, as follows:[114]

> It has long been the rule in this state . . . that felonies may be prosecuted by either indictment or information.[115] Although there are differences between the two procedures, a defendant who is proceeded against by an indictment is not denied due process or equal protection.[116] It similarly does not violate due process to initiate a prosecution by an information rather than an indictment.[117]
>
> In support of his contention defendant relies upon cases in which it was held that constitutionally impermissible classifications were contained in the legislation or rule there in question.[118] The provisions which concern us here do not contain such a classification.[119]

Thus, by 1978, it had been established for virtually a century that prosecution by grand jury indictment (without a preliminary hearing) was constitutional, that prosecution by information and preliminary hearing was also constitutional, and that the authority

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112. *See* People v. Goldenson, 76 Cal. 328, 345, 19 P. 161, 168-69 (1888); People v. Bird, 212 Cal. 632, 643-46, 300 P. 23, 28 (1931).

113. 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972) (Justice McComb concurred in the court's opinion, except insofar as it commuted the death sentence originally imposed).

114. For purposes of clarity, Justice Mosk's citations have been removed from the text and placed in footnotes 115-118.

115. In support of this proposition, Justice Mosk cites: CAL. CONST. art. I, § 8; CAL. PENAL CODE §§ 682, 737, 739, 917, 949 (West 1972).

116. Citing In re Wells, 20 Cal. App. 3d 640, 649, 98 Cal. Rptr. 1, 5-6 (1971); People v. Pearce, 8 Cal. App. 3d 984, 986-89, 87 Cal. Rptr. 814, 815-18 (1970); People v. Newton, 8 Cal. App. 3d 359, 388, 87 Cal. Rptr. 394, 413 (1970); People v. Rojas, 2 Cal. App. 3d 767, 771, 82 Cal. Rptr. 862, 864-65 (1969); People v. Flores, 276 Cal. App. 2d 61, 65-66, 81 Cal. Rptr. 197, 200 (1969).

117. Citing Hurtado v. California, 110 U.S. 516, 538 (1884); In re Terry, 4 Cal. 3d 911, 926, 484 P.2d 1375, 1386, 95 Cal. Rptr. 31, 42 (1971).

118. Citing McLaughlin v. Florida, 379 U.S. 184 (1964) (classification based on race); Douglas v. California, 372 U.S. 353 (1963) (classification based on indigency); Skinner v. Oklahoma, 316 U.S. 535 (1942) (classification requiring sterilization under certain circumstances of persons convicted of larceny but not of those convicted of embezzlement).

119. *Sirhan*, 7 Cal. 3d at 746-47, 497 P.2d at 1146, 102 Cal. Rptr. at 410 (citations omitted and added as footnotes).

to modify the system was properly with the legislature. Furthermore, the Committee recently entrusted with the task of updating the state constitution had affirmed these conclusions, the Committee's recommendations were approved by the people by popular vote, and the state supreme court had itself unanimously concurred. It is in this context that the court reversed field and handed down its opinion, authored by Justice Mosk, in *Hawkins v. Superior Court.*[120]

In that case, the court ruled (over a vigorous dissent by Justice Richardson, joined by Justice Clark) that the grand jury provision of the California Declaration of Rights violated the equal protection provision of section 7 of the same Declaration, notwithstanding its contrary conclusion six years earlier. The ground for this decision was "excessive prosecutorial influence."[121] For the majority, the grand jury was "the total captive of the prosecutor;" suffering from "institutional schizophrenia" because it is subject to the prosecutor's "completely unfettered discretion," such that the prosecutor himself is free to "act whimsically" because he finds himself in a "prosecutor's Eden."[122] The court went on to find that any indictment must be followed by a preliminary hearing. The court thereby virtually abolished the criminal grand jury.

Not only is this result at odds with the previous legal history of the grand jury in California, it is completely out of step with the rest of the nation. First, there is a strong contrast between the California Supreme Court in *Hawkins* and the United States Supreme Court regarding the grand jury system, both as to

120. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).
121. *Id.* at 591, 586 P.2d at 920, 150 Cal. Rptr. at 439.
122. *Id.* at 590-92, 586 P.2d at 919-21, 150 Cal. Rptr. at 438-40.

substantive law[123] and overall attitude.[124] Even more remarkable, though, is the contrast between their respective opinions regarding the leading role of the prosecutor in that system. For the federal High Court, that role is not an opportunity for "whimsical[]" behavior, but is a salutary guide for the grand jury's deliberations:

> The purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate "independently of either prosecuting attorney or judge." Nevertheless, a modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands. The prosecutor ordinarily brings matters to the attention of the grand jury and gathers

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123. Compare the conclusion in *Hawkins* with *Costello v. United States*, 350 U.S. 359 (1956): "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.* at 363 (footnote omitted). *Accord*, Bracy v. United States, 435 U.S. 1301, 1303 (Rehnquist, Circuit Justice 1978). *See also* Jaben v. United States, 381 U.S. 214, 220 (1965) (grand jury indictment supersedes need for preliminary hearing); United States v. Anderson, 481 F.2d 685, 691 (4th Cir. 1973); United States v. Le Pera, 443 F.2d 810, 811 (9th Cir. 1971); Austin v. United States, 408 F.2d 808, 810 (9th Cir. 1969); United States v. Conway, 415 F.2d 158, 160 (3rd Cir. 1969), *cert. denied*, 397 U.S. 994 (1969); Bayless v. United States, 381 F.2d 67, 71 (9th Cir. 1967); United States v. Chase, 372 F.2d 453, 467 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); Crump v. Anderson, 352 F.2d 649, 653 (D.C. Cir. 1965); Byrnes v. United States, 327 F.2d 825, 834 (9th Cir. 1964) (no right to a preliminary hearing after indictment). In fact, there is no federal constitutional right to a preliminary hearing, with or without indictment. Beck v. Washington, 369 U.S. 541, 545 (1962); Ocampo v. United States, 234 U.S. 91, 98 (1914); Lem Woon v. Oregon, 229 U.S. 586, 590 (1913). *See* Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975) (preliminary hearing only required in cases of pretrial confinement). *See also* Harris v. Estelle, 487 F.2d 1293, 1296 (5th Cir. 1974) (no federal constitutional right to a preliminary hearing).

124. In the wake of the *Costello* decision, the High Court in several subsequent cases set out the historical and constitutional values -- and corresponding powers -- embodied in the grand jury. *See* United States v. Sells Engineering, Inc., 463 U.S. 418, 423-24 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-20 (1979); United States v. Calandra, 414 U.S. 338, 343 (1974); Branzburg v. Hayes, 408 U.S. 665, 686-91 (1972); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959). These decisions are summarized in *United States v. Sells Engineering, Inc.*, where the Court began by observing that:

> The grand jury has always occupied a high place as an instrument of justice in our system of criminal law -- so much so that it is enshrined in the Constitution. It serves the "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." It has always been extended extraordinary powers of investigation and great responsibility for directing its own efforts.

Sells Engineering, 463 U.S. at 423 (citations omitted) (footnote omitted in original) (quoting Branzburg v. Hayes, 408 U.S. at 686-87).

> the evidence required for the jury's consideration. . . . [I]t depends largely on the prosecutor's office to secure the evidence or witnesses it requires. The prosecutor also advises the lay jury on the applicable law. . . . If he considers that the law and the admissible evidence will not support a conviction, he can be expected to advise the grand jury not to indict. He must also examine indictments, and the basis for their issuance, to determine whether it is in the interests of justice to proceed with prosecution.[125]

Compared to the attitude of the majority in *Hawkins*, the United States Supreme Court would seem to be naive about the shortcomings of the grand jury system. Yet that Court, and the federal system in general, have far longer and more extensive experience with the grand jury system than does the California Supreme Court, or the California system as a whole. And even the most cynical person can hardly accuse the justices who participated in the majority opinions cited above of being unsympathetic to civil liberties.[126] The fact of the matter is that the federal High Court knows whereof it speaks when it comes to the grand jury system, and it has consistently and zealously protected it as a proven and effective charging method.

Moreover, coming from as prominent a state as California, *Hawkins*' alleged discovery of a constitutional right to a post-indictment preliminary hearing has found remarkably little support among its sister states. On the contrary, the vast majority of states to have considered the issue either have determined that there is no right to a post-indictment preliminary hearing at all, or have found it to be purely statutory, rejecting attempts to find such a right in their state constitutions.[127]

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125. *Sells Engineering*, 463 U.S. at 430 (citations and footnotes omitted).

126. For instance, Chief Justice Warren and Justice Douglas joined in Justice Black's opinion for the Court in *Costello*, 350 U.S. at 359; and Justices Marshall and Blackman joined in Justice Brennan's opinion for the Court in *Sells Engineering*, 463 U.S. at 420.

127. *See* Elmore v. State, 445 So. 2d 943, 945-46 (Ala. Crim. App. 1983); Pascua v. State, 633 P.2d 1033, 1034 n.3 (Alaska Ct. App. 1981), *overruled on other grounds*, Johnson v. State, 662 P.2d 981, 984 (Alaska Ct. App. 1983); State v. Meeker, 143 Ariz. 256, 265, 693 P.2d 911, 920 (1984); People v. Dist. Court for Second Jud. Dist., 199 Colo. 398, 401, 610 P.2d 490, 492 (1980); State v. Cobbs, 164 Conn. 402, 405-06, 324 A.2d 234, 238 (1973) (note: Connecticut abolished the grand jury system by state constitutional amendment in 1982. *See* State v. Mitchell, 200 Conn. 323, 512 A.2d

The chief flaw of the *Hawkins* opinion is its presumptuousness. It is obvious that opinions differ sharply with regard to the advisability of prosecution by grand jury indictment. They have differed sharply for well over a century. But, as we have seen, the drafters of the 1879 constitution intended to maintain the system of

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140 (1986)); Smith v. State, 344 A.2d 251, 253 (Del. Super. Ct. 1975); State v. Middlebrooks, 236 Ga. 52, 55, 222 S.E.2d 343, 345-46 (1976); Chung v. Ogata, 53 Haw. 364, 364-69, 493 P.2d 1342, 1343-45 (1972); People v. Kline, 92 Ill. 490, 500-01, 442 N.E.2d 154, 159 (1982) (rejecting *Hawkins*); State v. Arnold, 421 A.2d 932, 935 (Me. 1980); State v. Johnson, 291 Minn. 407, 413, 192 N.W.2d 87, 91-92 (1971); Lataille v. Dist. Court of East Hampden, 366 Mass. 525, 530-31, 320 N.E.2d 877, 881 (1974); Seim v. State, 95 Nev. 89, 97-99, 590 P.2d 1152, 1157-58 (1979) (rejecting *Hawkins*); Smith v. O'Brien, 109 N.H. 317, 251 A.2d 323-24 (1969); State v. Muise, 103 N.M. 382, 387, 707 P.2d 1192, 1197 (1985); State v. Hudson, 295 N.C. 427, 431, 245 S.E.2d 686, 689 (1978); State v. Lamp, 59 Ohio App. 2d 125, 126-27, 13 Ohio Op. 3d 173, 174, 392 N.E.2d 1090, 1092 (1977); Commonwealth v. Bestwick, 489 Pa. 603, 414 A.2d 1373, 1377-79 (1980) (rejecting *Hawkins*); State v. Luna, 378 N.W.2d 229, 237 (S.D. 1985) (expressly rejecting *Hawkins*); State *ex rel.* Holmes v. Salinas, 784 S.W.2d 421, 424-25 (Tex. Crim. App. 1990); Titcomb v. Wyant, 1 Va. App. 31, 39, 333 S.E.2d 82, 87 (1985), citing Webb v. Commonwealth, 204 Va. 24, 129 S.E.2d 22 (1963); State *ex rel.* Rowe v. Ferguson, 268 S.E.2d 45, 47-48 n.4 (W. Va. 1980) (rejecting *Hawkins*); Hennigan v. State, 746 P.2d 360, 374-76 (Wyo. 1987) (expressly rejecting *Hawkins*); Des Moines Register & Tribune v. Dist. Ct., 426 N.W.2d 142, 145-46 (Iowa 1988) (rejecting the rule in *Hawkins*) (no constitutional right to a post-indictment preliminary hearing). *See also* State v. Holmes, 388 So. 2d 722, 724-25 (La. 1980); Vaughn v. State, 557 S.W.2d 64, 64-65 (Tenn. 1977); State v. Tolman, 775 P.2d 422, 425-26 (Utah App. 1989); State v. Dunn, 121 Wis. 2d 389, 394, 359 N.W.2d 151, 153 (1984); State v. Sherry, 233 Kan. 920, 924-32, 667 P.2d 367, 372-77 (1983); State v. Persons, 201 N.W.2d 895, 897 (N.D. 1972) (right to preliminary hearing is purely statutory); Lovell v. State, 250 So. 2d 915, 916 (Fla. Dist. Ct. App. 1971); State v. Edmonson, 113 Idaho 230, 232-36, 743 P.2d 459, 461-65 (1987); King v. Venters, 595 S.W.2d 714, 714-15 (Ky. 1980) (expressly rejecting *Hawkins*); Thomas v. State, 50 Md. App. 286, 437 A.2d 678 (1981), relying upon Marshall v. State, 46 Md. App. 695, 420 A.2d 1266 (1980), *rev'd on other grounds*, 291 Md. 205, 434 A.2d 555 (1981); Glass v. State, 278 So. 2d 384, 387 (Miss. 1973); State v. McGee, 757 S.W.2d 321, 325 (Mo. App. 1988); State v. Mitchell, 164 N.J. Super. 198, 201-02, 395 A.2d 1257, 1258 (1978); People v. Johnson, 415 N.Y.S.2d 604, 606, 99 Misc. 2d 132 (1979); State v. Keenan, 278 S.C. 361, 364, 296 S.E.2d 676, 678 (1982) (no state constitutional right to a preliminary hearing). *Cf.* Collins v. State, 561 P.2d 1373, 1383 (Okla. Crim. App. 1977) (rejecting equal protection challenge to alternative prosecution by information or indictment); Stone v. Hope, 488 P.2d 616 (Okla. Crim. App. 1971) (finding statutory right to post-indictment preliminary hearing). *But cf.* State v. Freeland, 295 Or. 367, 667 P.2d 509 (1983); State v. Clark, 291 Or. 231, 630 P.2d 810 (1981) (rejecting *Hawkins'* requirement of mandatory post-indictment preliminary hearing, but creating a requirement of special consistency under state equal protection clause); People v. Duncan, 388 Mich. 489, 502, 201 N.W.2d 629, 635 (1972) (finding post-indictment preliminary hearing required by Michigan Supreme Court's supervisory power, without addressing constitutional issues). *Cf.* People v. Hall, 435 Mich. 599, 603, 460 N.W.2d 520, 522 (1990) (finding preliminary hearing to be "'solely . . . a statutory right'"). In summary, insofar as we can discover, only a very few states have implied a right to a post-indictment preliminary hearing where such is not specifically required by statute, and none (with the arguable exception of Oregon) has followed the equal protection reasoning advanced in *Hawkins*.

alternative prosecution by indictment or information, leaving it up to the *legislature* to amend the system. Furthermore, the events of the decade immediately preceding *Hawkins* could hardly have been clearer, in that the system had been maintained by the Constitutional Revision Committee, approved by the voters, and endorsed by the California Supreme Court itself, in *Sirhan.* Whatever the inadequacies of "original intent" analysis, the *Hawkins* opinion fairly invites Professor Levy's comment that such an analysis is "far more preferable than the surrealistic visions, moral reasoning, and noninterpretivism that abandon the text, its historical origins, its Framers' intent, and the expositions of it in their time."[128]

Hawkins forms a fitting conclusion to our review of the provenance and early history of our Declaration of Rights.[129] That review shows that the criminal provisions of the Declaration which have most frequently been given non-federal interpretations by the state supreme court are in fact precisely those provisions which come from the United States Constitution and were incorporated into the state constitution in order to provide those federal guarantees to the people vis-à-vis the state government. Furthermore, while there certainly *are* provisions of distinctly non-federal origins, these unique provisions have often been neglected or--as in the case of the grand jury provisions--nullified by the state supreme court. In other instances, the court has in recent times either made a small thing of those unique provisions (as with the jury trial provision), or it has made the *wrong* thing of them (as with the "cruel or unusual punishments" clause). It is in this context that we come to consider the chronic constitutional crisis

128. LEVY, ORIGINAL INTENT, *supra* note 6, at 373-74.

129. While this Article was being prepared for publication, the California Supreme Court handed down its ruling in *Bowens v. Superior Court*, 1 Cal. 4th 36, 820 P.2d 600, 2 Cal. Rptr. 2d 376 (1991). This case held that Proposition 115 had abrogated *Hawkins* by adding section 14.1 to article I, providing that: "If a felony is prosecuted by indictment, there shall be no post-indictment preliminary hearing." *Bowens*, 1 Cal. 4th at 45-46, 820 P.2d at 605, 2 Cal. Rptr. 2d at 382. *See* CAL. CONST. art. I, § 14.1. Justice Mosk, having been the author of the *Hawkins* case, and other intervening decisions, filed a long dissent.

of the past couple of decades, as it developed under the aegis of the independent state grounds doctrine.

PART II

DOWN THE RABBIT HOLE: *Adequate and Independent State Grounds in California, circa 1970-1990*

> *Alice skwooched up her forehead and ventured quietly, "If he writes the same thing, why does he do it twice?"*
>
> *"Because," said the White Rabbit, "he may write the same thing, but it's read differently."*

-- Justice Stanley Mosk, on how to interpret the same provisions in state and federal constitutions, differently.[130]

> *"When* I *use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less."*
>
> *"The question is," said Alice, "whether you* can *make words mean so many different things."*
>
> *"The question is," said Humpty Dumpty, "which is to be master - - that's all."*

-- Lewis Carroll, in *Through the Looking-Glass.*[131]

A. The Modern Confrontation Between the Court and the Voters

In the area of criminal procedure, the constitutional history of the past twenty years in this state has been one of repeated

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130. Stanley Mosk, *The State Courts, in* AMERICAN LAW: THE THIRD CENTURY: THE LAW BICENTENNIAL VOLUME 213, 225 (Bernard Schwartz et al. eds., 1976). Justice Mosk prefaces this passage with the following introduction: "Why do we have two sets of constitutions -- federal and state -- in this one nation? Perhaps an answer can be found in this mythical quotation from Alice in Wonderland." *Id.* (footnote omitted).

131. L. CARROLL, THROUGH THE LOOKING-GLASS 131 (1865 & reprint St. Martin's Press 1977).

confrontation between the state supreme court and California voters. Typically, these "showdowns" were provoked when the court fastened upon a provision of the Declaration of Rights which was virtually identical to a corresponding provision of the federal constitution. The court would extol the "independent vitality" of the state constitution and then construe the provision in question in a manner in which it had never been interpreted before and contrary to the United States Supreme Court's recent interpretations of the parallel federal provision and to its own prior precedents. In fact, before 1970 the California Supreme Court had generally followed federal law as a matter of course. It should therefore come as no surprise that the California Supreme Court's first departure from previously-followed federal law usually came precisely in these recent, independent state grounds cases. This circumstance caused the California Declaration of Rights to assume the appearance of a sort of "escape clause" for those seeking to avoid the consequences of United States Supreme Court decisions.

Among the most controversial in this regard were those instances in which the United States Supreme Court overruled the California court's interpretation based on the federal constitution, only to have the state court belatedly espouse the "independent vitality" of the state provision, thereby avoiding the authority of the federal High Court.[132] The California court also resorted to

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132. *See, e.g.*, People v. Ramos, 30 Cal. 3d 553, 591-96, 639 P.2d 908, 930-33, 180 Cal. Rptr. 266, 288-91 (1982) (holding so-called Briggs Instruction in death penalty cases unconstitutional under the federal due process clause and Eighth Amendment), *overruled in* California v. Ramos, 463 U.S. 992 (1983), *on remand*, People v. Ramos, 37 Cal. 3d 136, 151-55, 689 P.2d 430, 438-41, 207 Cal. Rptr. 800, 808-11 (1984) (holding that the Briggs Instruction was unconstitutional under the *state* due process clause); Serrano v. Priest, 5 Cal. 3d 584, 617-19, 487 P.2d 1241, 1264-66, 96 Cal. Rptr. 601, 624-26 (1971) [hereinafter, *Serrano I*] (holding the state school financing system unconstitutional under the federal equal protection clause), *abrogated by* San Antonio School District v. Rodriguez, 411 U.S. 1, 44-53 (1973) (holding a similar financing system constitutional under federal equal protection clause), *followed by* Serrano v. Priest, 18 Cal. 3d 728, 762, 774-76, 557 P.2d 929, 949, 957-58, 135 Cal. Rptr. 345, 365, 373-74 (1976) (acknowledging that *San Antonio* undercut *Serrano I*, but holding the state financing system unconstitutional under *state* equal protection clause); People v. Green, 70 Cal. 2d 654, 665, 451 P.2d 422, 429, 75 Cal. Rptr. 782, 789 (1969) (finding consideration of prior inconsistent statements for substantive purposes unconstitutional under federal confrontation clause), *rev'd in* California v. Green, 399 U.S. 149 (1970), *followed by* People v. Chavez, 26 Cal. 3d 334, 357, 605 P.2d 401, 415, 161 Cal. Rptr. 762, 776 (1980) (rejecting the *Green* rule on the basis of the *state* confrontation clause); Diamond v. Bland, 3 Cal. 3d 653, 665-66, 477

basing its decision upon *both* federal *and* state constitutional grounds, rendering effective review, either by the United States Supreme Court or by California voters, extraordinarily difficult.[133] Within the legal community, these approaches subjected the court to criticism that it was seeking to insulate itself from review by the United States Supreme Court,[134] by means of "constitution shopping."[135] Even supporters of the independent state grounds approach have admitted to considerable discomfort over these adventures in legal creativity.[136] On the court itself, dissenters from the majority's approach responded with everything from acerbic remarks[137] to long and learned historical essays, reproving the majority.[138]

Whatever the truth of the accusations that the court was seeking to insulate itself from review by the federal Supreme Court, the

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P.2d 733, 741, 91 Cal. Rptr. 501, 509 (1970) (holding limitation upon solicitation at shopping center unconstitutional under federal First Amendment), *abrogated by* Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (holding such limitations did not violate the federal First Amendment), *followed by* Diamond v. Bland, 11 Cal. 3d 331, 335, 521 P.2d 460, 463, 113 Cal. Rptr. 468, 471 (1974) (adopting the federal rule from *Tanner*); *Diamond* itself was *overruled in* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979) (holding limitations upon solicitation at shopping centers unconstitutional based upon the state constitutional rights of free speech and petition).

133. *See, e.g.*, People v. Ramey, 16 Cal. 3d 263, 275-76, 545 P.2d 1333, 1340-41, 127 Cal. Rptr. 629, 636-37 (1976) (requiring arrest warrant for arrest in home absent exigent circumstances); People v. Scott, 16 Cal. 3d 242, 250, 546 P.2d 327, 332-33, 128 Cal. Rptr. 39, 44-45 (1976) (limiting pat-down searches).

134. *See* Van de Kamp & Gerry, *Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California Constitution*, 33 HASTINGS L.J. 1109, 1124-26 (1982); Deukmejian & Thompson, *All Sail and No Anchor--Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 989 (1979); Bice, *supra* note 79 *passim*. *See also* Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 106-07 (1985) [hereinafter Hudnut, *State Constitutions*]; Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118, 1126-28 (1984). *See also In re* Roger S., 19 Cal. 3d 921, 946, 569 P.2d 1286, 1301, 141 Cal. Rptr. 298, 313 (1977) (Clark, J., dissenting) (stating that "No court should presume that it is so immune from error that it may foreclose every means of challenging its decisions").

135. Deukmejian & Thompson, *supra* note 134, at 989.

136. Grodin, *Some Reflections*, *supra* note 23, at 398-99.

137. *See, e.g.*, People v. Pettingill, 21 Cal. 3d 231, 254, 578 P.2d 108, 122, 145 Cal. Rptr. 861, 875 (1978) (Justice Clark accusing the majority of playing a "shell game" with the state and federal constitutions).

138. *See, e.g.*, Hawkins v. Superior Court, 22 Cal. 3d 584, 610-19, 586 P.2d 916, 933-39, 150 Cal. Rptr. 435, 452-58 (1978) (Richardson, J., dissenting).

insulation has repeatedly proven itself to be ineffective. Indeed, the primary effect of the "independent state grounds" decisions in the criminal procedure area was to leave the California Supreme Court "out in the cold" with the people of this state, who undertook to accomplish what the United States Supreme Court would or could not, by rejecting the California court's innovations through the extraordinary and costly means of popular initiatives. In the following pages, we review the history of the independent state grounds doctrine as practiced by the California Supreme Court, and the responses by the voters rejecting the court's innovations. We find that the lessons of these showdowns affirm the general conclusion of Part I. As they did at our state constitutional conventions of the last century, so also in recent decades, the people of this State have generally supported the federal interpretation of criminal procedural rights.

If one criminal case were to be chosen as the opening salvo in the confrontation between the voters and the court, it would probably be *People v. Anderson*[139] in 1972. In that case, the court rejected its own long-standing precedent as well as the rulings of the United States Supreme Court and held the death penalty unconstitutional as violating the provision of the California Declaration prohibiting "cruel or unusual punishments."[140] We have already addressed Justice Wright's attempt to anchor the decision in the "or" of "cruel or unusual punishments."[141] The remainder of the majority opinion consists essentially in an effort to justify the abandonment of a century of precedent on the grounds that present moral standards had evolved beyond previous, less enlightened views. In other words, as a society we have progressed and learned to recognize that capital punishment "is incompatible with the dignity of man and the judicial process."[142] Thus, the court seemed to assert that it was merely acknowledging the emergence of an enlightened consensus by

139. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
140. *Id.* at 656, 493 P.2d at 899, 100 Cal. Rptr. at 171.
141. *See supra* text accompanying notes 77-85.
142. *Anderson*, 6 Cal. 3d at 656, 493 P.2d at 899, 100 Cal. Rptr. at 171.

abolishing the death penalty. There was one very obvious defect to this argument: it reflected the moral commitments of the majority of the court itself, rather than of the majority of the electorate. In 1972, as today, most people favored the death penalty. Having failed to persuade the voters regarding this issue, the court instead threw down a gauntlet: "Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency."[143]

The response was foreseeable enough. The "public," with near-record speed, passed a popular initiative in 1974 amending article I, section 27. The amendment resurrected the death penalty and required that the court hue to the decisions of the United States Supreme Court in its interpretation of the "cruel and/or unusual punishments" clause as applied to the death penalty.[144] Regardless of how one may feel about this particular issue, this exchange between the supreme court and the voters *could* have had a positive outcome. The court could have acknowledged that it is an integral, albeit unique, part of the democratic process of this state, not an entity apart from and "above it all." The court could then have carried on, not as an engine of constitutional power, but as a "generator of consent"[145]--that is, as a persuader to the legal community and educator of the community as a whole.

For their part, the people of this state can act as potent sources of democratic legitimacy for decisions of the court. As Justice Robert Utter of the Washington Supreme Court has observed:

> Popular reaction to state court decisions is inevitable, whether viewed as a positive phenomenon, enlightening the courts on deeply held popular values, or whether seen negatively, threatening judicial independence. If the supporters of unpopular jurisprudence perceive that public backlash stems from misunderstandings of the law, then they may consider how to better educate the public.[146]

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143. *Id.* at 648, 493 P.2d at 893, 100 Cal. Rptr. at 165.

144. *See* CAL. CONST. art. I, § 27.

145. *See* A. BICKEL, THE MORALITY OF CONSENT 15 (1975).

146. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 48 (1989).

As Justice Utter also emphasizes, rather than constituting a threat to judicial independence, the voters, by supporting their judiciary at the polls, or by passing constitutional amendments affirming state court opinions, can add great authority to the jurisprudence of that state court--and, in the process, provide a model for the United States Supreme Court, notably on issues of national consequence which that Court has yet to decide.[147]

In any case, it was not to be. By 1974, the court had already headed down the road of remaking the state's criminal procedure in reliance upon "independent state grounds," apparently oblivious to the political resistance it was engendering. The stage was set for the build-up to the next great explosion--"Prop. 8."

B. "Adequate and Independent State Grounds": Neither "State," Nor "Independent"--Nor Adequate Grounds

The independent state grounds doctrine in California as it has been used to depart from United States Supreme Court holdings by relying on the California Declaration of Rights, is of recent vintage and shallow draft. In the criminal area, the modern doctrine only fully emerged about 20 years ago, with the exception of a single line of cases addressing double jeopardy.[148] Moreover, as it has developed since then, it is the handiwork of just a few justices. Indeed, it is largely the work of Justice Stanley Mosk.[149]

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147. *Id.* at 46-47.

148. *See* People v. Compton, 6 Cal. 3d 55, 58, 490 P.2d 537, 538, 98 Cal. Rptr. 217, 218 (1971); Curry v. Superior Court, 2 Cal. 3d 707, 716, 470 P.2d 345, 350, 87 Cal. Rptr. 361, 366 (1970); Cardenas v. Superior Court, 56 Cal. 2d 273, 275-76, 363 P.2d 889, 891, 14 Cal. Rptr. 657, 659 (1961) (rejecting recent holding in *Gori v. United States*, 367 U.S. 364 (1961), in favor of reliance upon the California double jeopardy clause).

149. As shall transpire below, many if not most of the major "independent state grounds" opinions were authored by Justice Mosk. In the earlier years, his place was sometimes taken by Chief Justice Wright (as in *Anderson*) or Justice Tobriner. After their departures, their supporting roles were often assumed by Chief Justice Bird and Justice Grodin. But there can be no doubt that Justice Mosk was the "chief architect of independent state grounds in California." Uelman, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069, 2070 (1988). *See* Goldberg, *Stanley Mosk: A Federalist for the 1980's*, 12 HASTINGS CONST. L.Q. 395 (1985) (endorsing Justice Mosk's application of independent state grounds).

In addition to being of recent and narrow origins, the independent state grounds doctrine of the past two decades has been essentially a reactive or (to cite the strong terminology of Professor Ronald Collins) "reactionary" exercise.[150] It has had little independent existence, but commonly comes into play when provoked by federal decisions. In other words, the California Supreme Court has turned to the Declaration of Rights when particular United States Supreme Court decisions contradicted the view of the majority of the state court, and seldom otherwise. Thus, one of the many paradoxical aspects of this area of law is that our "independent state" doctrines are in large measure of distinctly federal origin: In many cases, *both* the California rule *and* the federal rule which it was designed to obviate were based squarely upon United States Supreme Court precedent.[151]

Usually, this state of affairs came about either because the California court had adopted a rule directly from the United States Supreme Court, or because it had frankly sought to predict the federal rule in cases of first-impression. The federal High Court would then extend or restrict--some would say "change"--the federal rule, or, in the first-impression situation, adopt a rule contrary to what the California court predicted. It is only in such circumstances that the California Supreme Court has typically discovered the "independence" of our state constitution. The California high court would then use the state charter as a vehicle for retaining its original rule--a rule which, as just noted, was itself adopted precisely because it was believed to be the *federal* rule.[152]

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150. *See* Collins, *Reliance on State Constitutions--Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981).

151. The independent state grounds doctrine, itself, is of course also of federal origin, being at least a century old. *See generally* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

152. Often, "independent state grounds" cases are punctuated with a reference to section 24 of the Declaration. Section 24 of the Declaration, before it was amended by Proposition 115 in 1990, provided simply that: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." *Text of Proposed Law, in* VOTERS PAMPHLET, *supra* note 110, at 72. This is, of course, a statement of fact, just as the observation that "the United States Constitution is the supreme law of the land," as set forth in Article III, section 1, of the California Constitution, is a statement of fact. But it does not follow from these propositions that any particular provision of the California Constitution ought to be interpreted, respectively, *different from* the federal

These incongruous origins of the alleged "independent vitality" of the state constitution have in turn encouraged both the state supreme court and sympathetic commentators to engage in exercises in the retrospective rewriting of history, whereby the federal origins of the rule were all but forgotten and the "independent state origins" of the state rule lauded and projected into the past. This selective forgetfulness in turn provided several important props of legitimacy for the court's departure from its prior common commitment to the applicable federal rule. First, by ignoring the federal provenance of the original rule, the court could rationalize that, rather than *departing* from its previous practice (abiding by the federal rule), it was merely maintaining its independent state rule, in the face of a departure by the United States Supreme Court. Second, it gives the impression that the novel state-constitutional rule has historically genuine state roots--roots which actually were federal. Third, with each new case, this approach could be used to bolster the legitimacy of using the independent state grounds doctrine in the next case, and so to suggest that the origins of that doctrine were much deeper than they in fact were.

* * *

A systematic review of the independent state grounds doctrine, as practiced by the California Supreme Court, lies beyond the scope of this Article. Instead, we will concentrate upon one of the central foci of the controversy that led to Proposition 8--namely, the exclusionary rule--to illustrate the patterns described generally above.

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constitution, or *the same as* the federal constitution. In fact, all that these statements amount to is an affirmation that we live in a federal system. *See infra* text accompanying notes 198-205. As Justice Mosk has acknowledged, "this declaration of constitutional independence did not originate at that recent election; indeed the voters were told the provision was a mere reaffirmation of existing law." People v. Brisendine, 13 Cal. 3d 528, 551, 531 P.2d 1099, 1114, 119 Cal. Rptr. 315, 330 (1975). In the interest of accuracy, it should be noted that "this declaration of constitutional independence" actually *did* originate at "that recent election," in 1974. *See* VOTERS PAMPHLET, *supra* note 110.

The exclusionary rule was first adopted by the California Supreme Court in *People v. Cahan*[153] in 1955. At that time, the rule was not yet required of the states pursuant to the Fourteenth Amendment--but it *had* applied in the federal system since the United States Supreme Court's decision in *Weeks v. United States*[154] over forty years before *Cahan*. Justice Traynor, writing for the court, set out systematically to adopt that federal rule into California law on the same basis as had the federal High Court. He first noted the peculiar nature of the federal rule: "'the federal exclusionary rule,' in the words of Justice Black, 'is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.'"[155] Then, the court reviewed both federal and state law and set the stage for adoption of the exclusionary rule, as follows:

> [P]ursuant to the suggestion of the United States Supreme Court, we have reconsidered the rule we have heretofore followed that the unconstitutional methods by which evidence is obtained does not affect its admissibility and have carefully weighed the various arguments that have been advanced for and against that rule. . . . [W]hatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence.[156]

Justice Traynor then proceeded carefully to analyze and quote from United States Supreme Court cases supporting the exclusionary rule and announced the court's decision to adopt the rule as a "judicially declared rule of evidence"--just as was the federal rule.[157]

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153. 44 Cal. 2d 434, 282 P.2d 905 (1955).

154. 232 U.S. 383 (1914).

155. *Cahan*, 44 Cal. 2d at 440, 282 P.2d at 908 (quoting Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring)).

156. *Id.* at 442, 282 P.2d at 909-10.

157. *Id.* Although Justice Traynor noted the obvious fact that this was a California rule and that the court was not obligated to follow in every detail the federal application of the rule, the court certainly indicated no unhappiness with the federal rule as it then stood. *See id.* at 450-51, 282 P.2d at 914-15.

The same year as *Cahan*, the court adopted the *vicarious* exclusionary rule in *People v. Martin.*[158] It is ironic that this rule, which would become a source of great controversy in California, was adopted only after an explicit and meticulous effort to demonstrate that *it was the federal rule.* Certainly, this was no easy task, since the law in the lower federal courts was to the contrary. Nonetheless, Justice Traynor, again writing for the court, was at pains to show that a careful analysis of then-recent United States Supreme Court decisions implied that the vicarious rule was required by a proper understanding of those cases. It was on that basis that the California court adopted the vicarious exclusionary rule.[159]

This is the case background to the first, true application of the "independent state grounds" doctrine in this area of law, which took place in direct reaction to the United States Supreme Court's 1969 decision in *Alderman v. United States.*[160] In that case the federal High Court determined, contrary to *Martin*, that:

> [S]uppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.[161]

In other words, there was no federally-sanctioned vicarious exclusionary rule--thereby cutting the ground out from under the *Martin* decision. The California Supreme Court first confronted the fate of the *Martin* rule in *Kaplan v. Superior Court*[162] in 1971. Justice Mosk, writing for the majority, managed to avoid directly tackling the issue by *both* sticking to the rule in *Martin and* declining to rule on either federal or state constitutional grounds. Instead, the majority asserted that, "even though the *Martin* rule may not be 'required by' the prevailing federal interpretation of the

158. 45 Cal. 2d 755, 290 P.2d 855 (1955).
159. *Id.* at 760-61, 290 P.2d at 857.
160. 394 U.S. 165 (1969).
161. *Id.* at 171-72.
162. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

Fourth Amendment (*Alderman* v. *United States*), it is at least 'based on' the constitutionally compelled *Cahan* and *Mapp* [*v. Ohio*[163]] principles.''[164] In other words, the court definitely was not relying upon the California Constitution, nor was it following the United States Supreme Court, but it was nonetheless coming to its conclusion, contrary to the federal rule, '''based on'. . . constitutionally compelled . . . principles.'' This is an untenable argument, and it certainly did not convince the three concurring justices, whose spokesman was Justice Burke:

> I concur in the result . . . only under compulsion of the ''vicarious exclusionary rule'' adopted in *People* v. *Martin* . . . . [T]he majority reaffirm *Martin* solely upon the basis of their own preferences regarding the scope of the exclusionary rule, and have abandoned further reliance upon federal constitutional principles, as defined by the United States Supreme Court. In view of the apparent need for uniform standards in the search and seizure area, I deem such a course improvident.[165]

Nonetheless, the California Supreme Court delayed express admission that it had ''abandoned . . . federal constitutional principles'' until 1975--fully two decades after *Cahan* and *Martin*. The court finally crossed the Rubicon in *People v. Brisendine*.[166] Once again, the court was split four to three, with Justice Mosk writing for the majority and Justice Burke for the opposition. In support of the ''independent vitality of our state constitution,'' the majority relied in the first instance upon *People v. Superior Court (Simon)*,[167] a 1972 case. But, as Justice Burke points out in his

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163. 367 U.S. 643 (1961).

164. *Kaplan*, 6 Cal. 3d at 161, 491 P.2d at 8, 98 Cal. Rptr. at 656 (partial citation deleted).

165. *Id.* at 162, 491 P.2d at 8, 98 Cal. Rptr. at 656 (Burke, J., concurring) (footnote omitted).

166. 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). The issue in *Brisendine* was the permissible scope of a search upon arrest for a citation offense. As discussed below, in 1972, the California Supreme Court had limited the scope of such a search, interpreting the federal Fourth Amendment. People v. Superior Court (Simon), 7 Cal. 3d 186, 203-04, 496 P.2d 1205, 1218, 101 Cal. Rptr. 837, 850 (1972). The next year, the United States Supreme Court came to the contrary conclusion in *United States v. Robinson*, 414 U.S. 218 (1973), and in *Gustafson v. Florida*, 414 U.S. 260 (1973). This set up the confrontation in *Brisendine*.

167. 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972). The original case citation did not include real party in interest, Simon. In order to avoid confusion to other similar cites, we have added Simon to this citation.

dissent, *Simon* is a federally-based case which never so much as mentions the California Constitution:

> The majority seeks to avoid the impact of those United States Supreme Court decisions by now declaring that *Simon*, which mentions only the Fourth Amendment of the federal Constitution, was in fact based on our state constitutional provision against unreasonable searches and seizures.[168]

Undeterred, the majority opinion quoted Chief Justice Wright for the proposition that "'[o]n at least one occasion, however, we have expressly departed from the federal rule to afford defendants a broader security against unreasonable searches and seizures than that required by the Supreme Court. (See *People* v. *Martin* (1955) 45 Cal.2d 755, 759-761 [290 P.2d 855] [vicarious exclusionary rule].)'"[169] Of course, this statement is quite wrong. As discussed above, the exercise in *Martin* was exactly *not* to depart from the true federal rule but to figure out what it was and to act accordingly.

Next, the court cites to the *Cahan* and *Kaplan* cases for their supposed support for a distinct state constitutional rule:

> *Cahan* itself was decided six years before the exclusionary rule was made binding on the states in *Mapp* v. *Ohio*. . . . Our vicarious exclusionary rule has never been required under the Fourth Amendment [citation to *Alderman*] but has been a continuing feature of California law under our ability to impose higher standards for searches and seizures than compelled by the federal Constitution. (*Kaplan* v. *Superior Court* . . .).
>
> The foregoing cases illustrate the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force.[170]

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168. *Brisendine*, 13 Cal. 3d at 555, 531 P.2d at 1116, 119 Cal. Rptr. at 332 (Burke, J., dissenting).

169. *Id.* at 549, 531 P.2d at 1112, 119 Cal. Rptr. at 328 (quoting People v. Triggs, 8 Cal. 3d 884, 892 n.5, 506 P.2d 232, 237 n.5, 106 Cal. Rptr. 408, 413 n.5 (1973)).

170. *Id.* at 549-50, 531 P.2d at 1112-13, 119 Cal. Rptr. at 328-29 (footnote omitted).

Now, *Cahan* certainly did come down six years before *Mapp*, but we have seen that it also came down over a generation after *Weeks*, from which our exclusionary rule was actually derived. As for *Kaplan*, it is extraordinarily unclear what the basis of that decision was, but it is clear that it was *not* the California Constitution. So, it is hard to see how either case contributes to that constitution's "independent force." Having reached this "incontrovertible conclusion," the court went on to assert that:

> Any other result would contradict . . . the historic bases of state charters. *It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart.* The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.[171]

Without getting into all-encompassing claims regarding "state constitutions," these vague assertions, coming in the present context, are misleading. The issue in *Brisendine* was the California Declaration's *search and seizure* provision. We have shown above that the California search and seizure clause was consciously and carefully crafted precisely to "mirror" the federal counterpart.[172] Furthermore, the federal search and seizure provision in the Fourth Amendment was *not* "based upon" the provisions of prior state constitutions. As noted above, "[t]he ideas comprising the Fourth Amendment reversed rather than formalized colonial precedents."[173] By establishing that warrants *may* issue *but only* upon probable cause, the Fourth Amendment broke ground such as no state constitution had done previously. The fact is that the legal history, both recent and constitutional, in *Brisendine* is accomplished mostly "with smoke and mirrors." Far from showing the "independent vitality" of the California Constitution, it

171. *Id.* at 550, 531 P.2d at 1113, 119 Cal. Rptr. at 329 (emphasis added).

172. *See supra* text accompanying notes 59-61.

173. LEVY, ORIGINAL INTENT, *supra* note 6, at 224 (quoting William Cuddihy, The Fourth Amendment: Origins and Original Meaning, chapt. 7 (Ph.D. dissertation, Claremont Graduate School, manuscript-then-in-progress)). *See supra* note 61.

documents the dependency of the independent state grounds doctrine, as practiced by the California Supreme Court, upon prior federal jurisprudence.

* * *

Within the following year, the court twice extended the scope of the California search and seizure clause in reliance upon *Brisendine*,[174] and then used *Brisendine* as the basis for extending the independent state grounds doctrine to the *Miranda* rule in *People v. Disbrow*:[175]

> In *People* v. *Brisendine* . . . , we conducted an extended analysis of the question [of independent state grounds] and concluded that "the California Constitution is, and always has been, a document of independent force." We do not propose to repeat that discussion here except to note that we continue to adhere to the views expressed therein, and apply them in the case at bar.[176]

Disbrow represented the ultimate adoption of "independent state grounds" in the *Miranda* area; as such, it was preceded by a development similar to (if more publicly convoluted than) that in search and seizure law. As in the search and seizure area, the California Supreme Court had adopted the *Miranda* rule in *People v. Fioritto*,[177] in an opinion by Justice Mosk, on expressly *federal* grounds.[178] Three years later, the United States Supreme Court held in *Harris v. New York*[179] that statements taken in violation of *Miranda could* be used for impeachment purposes. This undercut

174. People v. Norman, 14 Cal. 3d 929, 538 P.2d 237, 123 Cal. Rptr. 109 (1975) (regarding the permitted scope of searches incident to arrest); People v. Longwill, 14 Cal. 3d 943, 952, 538 P.2d 753, 758-59, 123 Cal. Rptr. 297, 302-03 (1975) (holding that full body searches of individuals arrested for public intoxication are prohibited until they are actually to be incarcerated).

175. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

176. *Id.* at 115, 545 P.2d at 281, 127 Cal. Rptr. at 369.

177. 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

178. As the court in *Fioritto* stated at the outset of its opinion: "We conclude that under the explicit directives of *Miranda* defendant's confession was inadmissible . . . ." *Id.* at 716, 441 P.2d at 626, 68 Cal. Rptr. at 818.

179. 401 U.S. 222 (1971).

the rationale of *Fioritto*, much as *Alderman* had done to *Martin*. The next year, with Justice Mosk again writing for the majority, a deeply split court confronted this issue in *People v. Taylor*.[180] The court managed to avoid *Harris* by narrowing that very broadly written opinion practically to its facts and resurrecting prior United States Supreme Court precedent of dubious application.[181] Thus, whereas in *Kaplan*, the court claimed to be following the federal constitution while not abiding by the federal Supreme Court's interpretation of it, in *Taylor* the California court insisted that it was following the federal High Court, while departing from federal law.

The worm turned again in 1974, when the California court expressly and very broadly "adopted" the rule in *Harris*, in *People v. Nudd*[182]--this time over a strong dissent by Justice Mosk, joined by two other justices. *Nudd* was itself decided less than two years before Justice Mosk wrote the majority opinion for the court in *Disbrow*, which repudiated *Harris* and overruled *Nudd*, also by a vote of 4 to 3.[183]

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180. 8 Cal. 3d 174, 501 P.2d 918, 104 Cal. Rptr. 350 (1972). It seems clear that the ambivalence of the court was at a high point during the period of 1971-1973. Not only was the court split almost evenly on the issue of whether to support or resist the recent opinions of the Burger Court, but even the resisters were confused as to *how* such resistance should be carried out. The result was opinions such as *Kaplan* and *Taylor*, which are so unconvincing that even their authors abandoned them *sub silentio* after the independent state grounds doctrine had developed to an extent which would give them another avenue of escape from the federal High Court. Furthermore, the rhetorical weakness of these opinions and consequent controversy they aroused were only exacerbated by strong dissenting opinions.

181. *Id.* at 184-85, 501 P.2d at 924-25, 104 Cal. Rptr. at 356-57. As one commentator wrote at the time:

> That the seemingly broad holding in *Harris* would be so easily distinguished . . . seemed improbable, if not impossible. It seems likely that had *Taylor* been before the United States Supreme Court the result would have been different. . . . Beyond a doubt, defendants, prosecutors and trial judges are facing a difficult task reconciling the various decisions and ascertaining when impeachment use of illegally obtained evidence is or is not permissible.

Roof, Recent Decisions, 6 LOY. L.A.L. REV. 429, 435-436 (1973) (footnote omitted).

182. 12 Cal. 3d 204, 207-208, 524 P.2d 844, 846, 115 Cal. Rptr. 372, 374 (1974).

183. The particular reversal from *Nudd* to *Disbrow* occurred solely because Chief Justice Wright switched sides. Although Justice Burke retired in 1974, between *Nudd* and *Disbrow*, his place was taken by Justice Richardson, whose views regarding the independent state grounds doctrine were very similar to Justice Burke's. In fact, Justice Richardson would become the leading opponent of that doctrine on the court.

In light of *Nudd*, it was impossible for the majority in *Disbrow* to distinguish *Harris* in an even remotely persuasive manner. But, as noted above, by the time of *Disbrow* (1976), the court's opinion in *Brisendine* had embraced the independent state grounds doctrine. So once again applauding the "independent nature of the California Constitution,"[184] the California Supreme Court set about abandoning the court's previous adoption of federal law, while actually relying upon federal law to accomplish it. The court emphasizes the "history" set forth in *Brisendine*, as well as the *Fioritto* and *Taylor* cases (both, as noted, expressly federal in their underpinnings).[185] And it devotes much of the opinion in *Disbrow* to a lengthy analysis of United States Supreme Court cases, particularly *Miranda* itself--the point of which seems to have been to show that the California court was merely abiding by what the federal Court "really meant" in *Miranda*.

Repeated reversals from true course, such as in this line of cases--running from *Fioritto* to *Taylor* to *Nudd* to *Disbrow*--were bound to damage the standing and moral authority of the court in the eyes of the public and the legal community. Far from reflecting any rational development of law, these cases suggest the shifting coalitions amongst the justices during this period. Furthermore, as was the case in *Brisendine*, there is no effort to establish any special interest on the part of California (or of the states in general) in having a rule different from the federal rule. Nor did the majority of the California court make any notable effort to explain why it was reversing its own very recent holding in *Nudd*.

These are exactly the sort of developments that provoked Proposition 8. As Justice Richardson, writing for the three dissenting justices in *Disbrow*, warned presciently:

> "'The persuasion of the United States Supreme Court decisions is particularly strong in the area of search and seizure and the exclusionary rule. California courts have for years spoken of the basis of the exclusionary rule as the Fourth Amendment. A sudden switch to a

184. People v. Disbrow, 16 Cal. 3d, 101, 114, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976).

185. *Id.* at 109-15, 545 P.2d at 278-81, 127 Cal. Rptr. at 365-69.

> California ground to avoid the impact of federal high court decision invites the successful use of the initiative process to overrule the California decision with its concomitant harm to the prestige, influence, and function of the judicial branch of state government."'[186]

C. *Periphrasis: Recent Revisions to the California Constitution*

It would be premature to address the consequences of this next act without considering, at least in a general way, the constitutional revisions carried out in California in the 1960's and 1970's. This digression is called for for a couple of reasons -- one general, the other specific.

First, it serves to underline the fact that reasoned constitutional reform does not--and, in recent times, *has* not -- depended upon the state supreme court. Perhaps because it is so difficult to amend the *federal* constitution, it is easy to slip into the notion that the state supreme court was the only institution which could have measurably altered our criminal procedure, and that it was therefore legitimate--if not altogether laudable--for the court to embrace the novelties of constitutional interpretation such as it did during the last two decades. The fundamental weakness of this argument is that even before the period in which the "independent state grounds" argument seriously emerged, Californians had embarked upon a thorough revision of their constitution without the help of the state high court.[187]

This process began with the passage of Proposition 7 in 1962 and the subsequent creation of a Constitutional Revision Committee to accomplish the reform. The Committee, which consisted of representatives of many different groups, labored for over a decade. It revised the entire state constitution and presented its revisions to the voters in a series of popular initiatives. The revisions to the

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186. *Id.* at 118-19, 545 P.2d at 283, 127 Cal. Rptr. at 371 (Richardson, J., dissenting) (quoting People v. Norman, 14 Cal. 3d 929, 940-42, 538 P.2d 237, 246, 123 Cal. Rptr. 109, 118 (1975) (Clark, J., dissenting)) (Justice Clark adopted much of the opinion of Justice Thompson of the District Court of Appeal).

187. *See* Hyink, *California Revises its Constitution*, 22 W. POL. Q. 637-54 (1969) (regarding the Proposition 7 of 1962 and its aftermath, as discussed below).

Declaration of Rights were embodied in *another* Proposition 7 on the November, 1974 ballot. These recommendations resulted in many of the stylistic changes to provisions of the Declaration of Rights, which we have noted above.[188] But, the Commission also made changes to the Declaration which it regarded--and justified to the voters--as substantive modifications or additions to the Declaration.

This leads us to the second, specific justification for our digression. The Commission discussed these changes in its own reports. They also explained and justified them to the voters in the *California Voters Pamphlet*, a publication compiled by the California Secretary of State and sent to all registered voters.[189] The *Voters Pamphlet* includes the texts of initiatives, a professional legislative analysis of each, and brief statements for and against them. Such *Pamphlets* have long been regarded as basic sources for judicial interpretation of the intent of the drafters of a referendum or initiative, as well as the intentions of the voters in enacting it.[190]

The 1974 Constitutional Revision Initiative (Proposition 7) makes clear that one of the main intentions was to adopt and incorporate the *federal* "due process" and "equal protection"

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188. The Commission was generally careful to note when its changes were substantive, and when merely stylistic. *See* CALIFORNIA CONSTITUTIONAL REVISION COMMISSION, PROPOSED REVISION OF ARTICLE I, ARTICLE XX, ARTICLE XXII OF THE CALIFORNIA CONSTITUTION 17-33 (1971).

189. *See generally* VOTERS PAMPHLET, *supra* note 110.

190. *See, e.g.*, Legislature v. Eu, 54 Cal. 3d 492, 504, 816 P.2d 1309, 1315, 286 Cal. Rptr. 283, 289 (1991) (stating that the analysis and arguments in the ballot pamphlet are indicia of the voters' intent); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 245-46, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978). *See also* Kennedy Wholesale, Inc. v. State Bd. of Equalization, 53 Cal. 3d 245, 250, 806 P.2d 1360, 1363, 279 Cal. Rptr. 325, 328 (1991); In re Lance W., 37 Cal. 3d 873, 889 n.9, 694 P.2d 744, 754 n.9, 210 Cal. Rptr. 631, 641 n.9 (1985); Pacific Legal Foundation v. Brown, 29 Cal. 3d 168, 182-83, 624 P.2d 1215, 1222-23, 172 Cal. Rptr. 487, 494-95 (1981); People *ex rel.* Dept. Pub. Wks. v. Superior Court, 68 Cal. 2d 206, 212, 436 P.2d 342, 346, 65 Cal. Rptr. 342, 346 (1968); Barrett v. Hite, 61 Cal. 2d 103, 106, 389 P.2d 944, 946, 37 Cal. Rptr. 320, 322 (1964) (relying upon ballot pamphlets to interpret intent of initiative or referendum). In the case of Proposition 7 in 1974, the conclusions of the Legislative Analyst were actually incorporated into the Report to the Legislature, regarding the work of the Constitutional Revision Commission. *See* JOINT RULES COMMITTEE, CALIFORNIA LEGISLATURE, REPORT ON MATERIALS OF CONSTITUTION REVISION COMMISSION RELATING TO PROVISIONS IN CALIFORNIA CONSTITUTION RECOMMENDED OR ENDORSED BY COMMISSION 75-76 (1974).

rights into the California Declaration of Rights, as well as the "establishment" clause of the federal First Amendment. As it was stated by the Legislative Analyst:

> **Federal Rights in State Constitution.** The proposition puts the following three rights into the State Constitution. These rights presently are contained in the federal Constitution.
>
> (a) The Legislature shall make no law respecting the establishment of religion.
>
> (b) A person may not be deprived of life, liberty, or property without due process of law.
>
> (c) A person may not be denied equal protection of the laws.[191]

In support of the Proposition, the Chairman of the Constitution Revision Commission wrote in the *Pamphlet*:

> Proposition 7 revises Article 1 of the California Constitution by removing material that has been declared unconstitutional, or is not of constitutional importance. Proposition 7 contains all rights presently enjoyed by Californians and places in our State Constitution some of the rights enjoyed by Californians as citizens of the United States, but which are not presently in our State Constitution. For example, Proposition 7 adds to our Constitution the right of all Californians to due process of law. . . .[192]

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191. Legislative Analyst, *Analysis, in* VOTERS PAMPHLET, *supra* note 110, at 26. There is one obvious anomaly here. The California Declaration of Rights had always had a "due process" clause, which is worded for all practical purposes identically with subsection "(b)." In fact, a glance at page 71 of the *Pamphlet*, showing the text of the proposed additions and eliminations to the Declaration, shows the former "due process" clause stricken out in section 13. Whatever the logic may have been, it is clear that the Constitutional Revision Commission intended to model the due process right in the California constitution upon the federal right.

192. *Id.* at 28. The 1974 revision was thorough-going and not limited to the positive additions as set forth above. It also made changes which the Legislative Analyst described as follows:

> Rights of Persons Accused of Crime. Presently the State Constitution gives specific rights to persons accused of crime. This proposition adds the following:
>
> (1) The accused person has the right to be confronted with the witnesses against him.
>
> (2) The accused person has a right to have the assistance of a lawyer.
>
> (3) The accused person has a right to be personally present with a lawyer at the trial.
>
> (4) If the accused person does not understand English, he has the right to an interpreter.
>
> (5) Instead of being released on bail prior to trial, the accused person may be released on his or her own recognizance at the discretion of the court.

Thus, a general point of the revisions of the Declaration was to bring the criminal provisions of the California Declaration of Rights into *closer accord* with the United States Constitution as interpreted by the United States Supreme Court. By so doing, the revision followed in the tradition of the constitutional conventions of 1849 and 1879.

D. The Aftermath of Proposition 8

The great public controversy generated by the "independent state grounds" cases such as *Brisendine* and *Disbrow* led the voters in 1982 to pass Proposition 8, the "Victims' Bill of Rights," which, among other things, contained a "Truth-in-Evidence" provision.[193] This provision required that in California the exclusionary rule be interpreted in accordance with the United States Constitution. It thereby effectively abrogated the long series of "independent state grounds" decisions discussed above, including *Brisendine* and *Disbrow*.[194]

This rejection of the independent state grounds doctrine by the voters did not deter the state supreme court from travelling down this same road in areas not expressly barred by Proposition 8. Indeed, the court displayed considerable resistance to the "Truth-

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These rights already exist either in the United States Constitution or in present law. The amendment makes them part of the California Constitution.

Id. at 26 (emphasis added).

193. CAL. CONST. art. I, § 28(d). That provision states that:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Id.

194. *See* People v. May, 44 Cal. 3d 309, 311, 748 P.2d 307, 307-08, 243 Cal. Rptr. 309, 369-70 (1988) (holding that Proposition 8 had abrogated *Disbrow* and other, similar cases); In re Lance W., 37 Cal. 3d 873, 879, 694 P.2d 744, 747, 210 Cal. Rptr. 631, 634 (1985) (holding that Proposition 8 abrogated the exclusionary rule cases such as *Brisendine*). *See also* Brosnahan v. Brown, 32 Cal. 3d 236, 260-61, 651 P.2d 274, 288-89, 186 Cal. Rptr. 30, 44-45 (1982) (upholding the constitutionality of Proposition 8, as a general matter).

in-Evidence" provision even in the search and seizure area, often avoiding its implications if possible. The court could have demonstrated a responsive attitude to the democratic process by adopting the federal approach mandated by Proposition 8 in this area immediately after passage of the Proposition. Instead, in *People v. Smith*,[195] the court ruled that the Proposition was not retroactive.[196] As a result the California Supreme Court was still "developing" the now-terminal independent state grounds doctrine in the search and seizure area for years after the passage of Proposition 8.[197]

* * *

Justice Mosk, especially, has sought to justify these continued departures from United States Supreme Court precedent in the name of "federalism."[198] In particular, he has in recent years attempted to persuade "conservatives" that the independent state grounds doctrine has something to offer them: "The conservatives' concern over federalism and states' rights intersects--at least for the moment--with the liberals' concern over safe-guarding individual rights."[199] Now, federalism is certainly one of the core values of American democracy, and it ought to be of consequence to everyone, regardless of one's political loyalties. But, the seductive appeal to "federalism" in support of the independent state grounds doctrine belies the damage that unprincipled application of that doctrine can do to the vitality of federalism.

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195. 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983).

196. *Id.* at 258, 667 P.2d at 152, 193 Cal. Rptr. at 695.

197. *See, e.g.*, People v. Mayoff, 42 Cal. 3d 1302, 1318 n.9, 729 P.2d 166, 176 n.9, 233 Cal. Rptr. 2, 11 n.9 (1986); People v. Ruggles, 39 Cal. 3d 1, 4, 702 P.2d 170, 171, 216 Cal. Rptr. 88, 89 (1985); People v. Campa, 36 Cal. 3d 870, 876, 686 P.2d 634, 636, 206 Cal. Rptr. 114, 116 (1984); Williams v. Superior Court, 36 Cal. 3d 441, 449 n.6, 683 P.2d 699, 704 n.6, 204 Cal. Rptr. 700, 705 n.6 (1984).

198. *See* Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 *passim* (1985); Mosk, *The Emerging Agenda in State Constitutional Rights Law*, 496 ANNALS 54, 63-64 (1988).

199. *State Constitutionalism: Both Liberal and Conservative*, *supra* note 198, at 1092.

First, as Professor Earl Maltz has pointed out,[200] the independent state grounds doctrine (as used to depart from federal precedent) is, at best, largely irrelevant and, at worst, inimical to federalist principles. It is irrelevant because, although federalism is implicated when a federal court preempts a state court's action, the reverse is not the case, because of the Supremacy Clause. On the contrary, the real issue implicated by state court activism of the independent state grounds variety is the distribution of power *within* the state government, particularly between the state judiciary on the one hand and the state legislature and executive branches, on the other.[201] State courts which consistently adopt federal rules are merely deciding to give their coordinate branches of government maximum freedom of action, by declining to subject them to *two* separate systems of judicial review--federal and state--rather than to just one, the federal courts. Furthermore, the issue of "state autonomy," merely implies that state judges should not mindlessly confuse the federal standard with the "floor" of their analysis of their own state constitution: they are free to decide that their state charter protects either more or less than does the federal constitution. As Professor Maltz has observed:

> Discussions of state autonomy have played far too large a role in state constitutional analysis. . . . Moreover, by focusing on such considerations, courts and commentators divert attention from the real issues involved, issues concerning the allocation of decision-making authority within each state's government.[202]

Second, as Paul Hudnut has argued, "independent state grounds" analysis in the area of fundamental constitutional rights threatens the uniformity of the law between the states, a matter of special concern in the area of constitutional criminal rights, since

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200. *See generally* Maltz, *Federalism* and Maltz, *The Dark Side*, *supra* note 28.

201. This lesson is illustrated in the discussion of the tug-of-war between the California Supreme Court and the state legislature over criminal discovery. *See infra* text accompanying notes 229-239.

202. Maltz, *Federalism*, *supra* note 28, at 106.

it may lead to disparities of treatment which appear unfair or even capricious.[203] As one California commentator warned in 1976:

> In an age of ever increasing technology and mobility, the American people may find it "curiouser and curiouser" that conceptions of their fundamental rights should change dramatically when they merely cross a state line. . . . [S]tate judges must avoid excessive legislative invalidation. . . . Such cases might provoke state constitutional amendments of an overruling nature, or amendments to restrict the state judicial power itself.[204]

Third, inconsistent state and federal constitutional rules interfere with the institutional cooperation of state and federal governments upon which the functioning of a federal system depends. For instance, law enforcement officials need to understand what rules they are operating under. As Justice Jones of the Oregon Supreme Court has observed: "'Federal and state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or a state prosecution or both. In these instances, two different rules would cause confusion.'"[205] Thus, as federal and state law enforcement agencies have worked more and more closely with one another in regional task forces in recent decades, divergent state and federal laws threaten to interfere with the effective and equitable enforcement of the law.

Finally, and most importantly, unprincipled departures from federal precedent undermine the values and assumptions of a common legal culture, without which federalism threatens to become mere separatism. If ordinary people are simultaneously to maintain their loyalty and confidence in the principled authority of two separate jurisdictions--state and federal--under which they live,

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203. Hudnut, *State Constitutions*, *supra* note 134, at 91-92.

204. Lipson, *Serrano v. Priest, I and II: The Continuing Role of the California Supreme Court in Deciding Questions Arising Under the California Constitution*, 10 U.S.F. L. REV. 697, 721 (1976). *Serrano* was, of course, a civil case; but the general point applies (if anything with greater force) to the criminal area.

205. State v. Lowry, 295 Or. 337, 346, 667 P.2d 996, 1005 (1983) (Jones, J., concurring) (quoting State v. Florance, 270 Or. 169, 184-85, 527 P.2d 1202, 1209 (1974)), *quoted in* Hudnut, *State Constitutions*, *supra* note 134, at 93.

they must have faith that their two coordinate judiciaries are engaged in a common enterprise, based upon shared principles rather than divergent personalities. Where the text of a state constitutional provision is virtually identical to the federal counterpart, and where the constitutional history of the provision does not support departure from federal precedent, such departures by the state courts inevitably take on an appearance of being "result oriented"--reflective rather of the commitments of the majority, than of dispassionate reasoning. This is especially the case when (as so often in California) the departure involves an issue as fundamental and publicly visible as a constitutional right, when little or no effort is made to justify the departure in terms of a special state interest, and when the court is deeply split, with a strong dissent focusing attention upon the deficiencies of the majority opinion. The effect is to advertise the subjective and personal aspect of judging, by pitting the conclusions of the state court against those of the United States Supreme Court. The net impact is to corrode federalism, rather than to promote it.

We emphasize that our concern here is with the authority and legitimacy of the criminal judicial system, not with philosophical debates about the "objectivity" of judging, or the insufficiency of rules, as such, to decide "hard cases." The issue here is not "legal realism": it is *political realism*, in the highest senses of those two much-abused words. Unlike legal philosophers, judges do not exist in abstraction from our political culture. But neither are judges just like any other elected official or civil servant. They are, indeed, special, in ways which *both* give them peculiar independence *and* impose peculiar limitations upon their range and reasons for acting. In a democracy, the former latitude can be justified only to the extent that the latter constraints are honored. The shock of Proposition 8, which essentially decimated a major portion of the

California Supreme Court's jurisprudence, ought to have awoken the court to the practical realities of its constitutional obligations.

* * *

Once again, however, it was not to be. In areas not directly implicating the exclusionary rule, the aftermath of Proposition 8 was basically "business as usual" at the state supreme court, at least until the replacement of three justices, rejected by the voters at the judicial retention elections of 1986. Again, a systematic review is beyond our scope here. We will therefore use as an exemplar one of the issues central to Proposition 115 as passed by the voters in 1990--prosecutorial discovery. This area illustrates many of the characteristics which we have already witnessed in the exclusionary rule cases. One interesting difference is that the leading case in this area, *Jones v. Superior Court*,[206] was actually and forthrightly based on the California Constitution. Ironically, *Jones* was to be the subject of repeated restriction, and virtual repudiation, precisely by the most ardent advocates of "independent state grounds."

In *Jones*, petitioner sought relief from a trial court's order for prosecutorial discovery.[207] The self-incrimination provisions of the Fifth Amendment had not yet been incorporated into the "due process" clause of the Fourteenth Amendment, so as to be applicable to the states; therefore, a federal constitutional claim could not be made. Furthermore, there was little governing state legislation on this issue, since criminal discovery had been largely a common law development by the courts. Consequently, the basis of petitioner's claim was the "self-incrimination" clause of section 13 of the Declaration of Rights.[208] Justice Traynor, for the court, observed that "[d]iscovery is designed to ascertain the truth in criminal as well as in civil cases."[209] Noting the gradual

206. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).
207. *Id.* at 58, 372 P.2d at 920, 22 Cal. Rptr. at 880.
208. *Id.* at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.
209. *Id.* at 58, 372 P.2d at 920, 22 Cal. Rptr. at 880 (citations omitted).

expansion of discovery rights for defendants by the court, Justice Traynor rejected the contention that this was done solely to protect defendants' constitutional rights:

> Pretrial discovery in favor of defendants . . . is not required by due process. Accordingly, when this court permitted discovery in advance of as well as at the trial, it was not acting under constitutional compulsion but to promote the orderly ascertainment of the truth. That procedure should not be a one-way street.[210]

While limiting prosecutorial discovery of certain items infringing upon attorney-client privilege, the court in large measure approved the trial court's discovery order.

Eight years later, in *Prudhomme v. Superior Court*,[211] the court set off in a completely new direction, based explicitly upon developments in *federal* law. Relying upon "certain significant developments in the law since *Jones*," the court set out the following four factors in support of its departure from *Jones*: (1) The United States Supreme Court's decisions regarding the Fifth Amendment privilege against self-incrimination; (2) the Federal Rules of Criminal Procedure, then recently promulgated; (3) recent lower federal court cases questioning prosecutorial discovery of alibi witnesses; (4) and the fact that the United States Supreme Court had just granted certiorari in *Williams v. Florida*,[212] which involved the constitutionality of such an alibi statute.[213] On these grounds,[214] the court narrowed *Jones*, while stating that "[w]e do

210. *Id.* at 59-60, 372 P.2d at 921, 22 Cal. Rptr. at 881 (citations omitted).

211. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

212. 399 U.S. 78 (1970).

213. *Prudhomme*, 2 Cal. 3d at 323-25, 466 P.2d at 675-76, 85 Cal. Rptr. at 131-32.

214. The court did also quote from a California case, *People v. Schader*, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 1 (1969), but the apparent point of the quoted passage was exactly to emphasize the agreement of the California high court with the federal Supreme Court. *Prudhomme*, 2 Cal. 3d at 325, 466 P.2d at 676, 85 Cal. Rptr. at 132.

not intend to suggest that the prosecution should be barred from *any* discovery in this, or any other case."[215]

The *Williams* case had already been argued by the time *Prudhomme* was decided: the United States Supreme Court held that the notice-of-alibi rule *did not* violate the right against self-incrimination.[216] The lower federal court case referred to in *Prudhomme* was accordingly remanded to the district court for reconsideration in light of *Williams*,[217] and a notice-of-alibi provision was added to the Federal Rules of Criminal Procedure.[218] Thus, the federal foundations of *Prudhomme* and therefore the justification for the departure from *Jones*, had evaporated.

At this point, the court began rewriting *Prudhomme* retrospectively. In *Reynolds v. Superior Court*,[219] the court was forced to acknowledge the federal demise of prohibitions upon such notice-of-alibi rules.[220] But it was equally quick to discover a secret state basis underlying *Prudhomme*:

> While *Williams* may have laid to rest the contention that notice-of-alibi procedures are inconsistent with the federally guaranteed privilege against self-incrimination, this privilege is also secured to the people of

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215. *Prudhomme*, 2 Cal. 3d at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134. The court then explained that:

> A reasonable demand for factual information which, as in *Jones*, pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial, may present no substantial hazards of self-incrimination and therefore justify the trial judge in determining that under the facts and circumstances in the case before him it clearly appears that disclosure cannot possibly tend to incriminate defendant. However, unless those criteria are met, discovery should be refused.

Id. (footnote omitted). The court added that "[u]nless the order is confined to information which the defendant intends to disclose at trial, the order could also violate the attorney-client privilege, without regard to its possible incriminatory effect. However, the defendant cannot legitimately claim the privilege as to information which he will voluntarily disclose at trial." *Id.* at 327 n.10, 466 P.2d at 678 n.10, 85 Cal. Rptr. at 134 n.10 (citation omitted).

216. *Williams*, 399 U.S. at 86.

217. Cantillon v. Superior Court, 442 F.2d 1338 (9th Cir. 1971).

218. *See* FED. R. CRIM. P. 12.1 (effective December 1, 1975, by which Congress replaced the original rule promulgated by the Supreme Court).

219. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

220. *Id.* at 839-41, 528 P.2d at 47-49, 117 Cal. Rptr. at 439-41 (discussing then-recent United States Supreme Court decisions regarding notice-of-alibi rules).

> California by our state Constitution, whose construction is left to this court, informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions. . . . *Of course,* Prudhomme[] . . . *was in part based on this court's reading of pre-*Williams *federal law. Nevertheless, it cannot be gainsaid that* Prudhomme *put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires.*[221]

The language quoted above is particularly rich in the "whiggish history" which was characteristic of the California high court's jurisprudence during this period. In the first place, *Prudhomme* was not "in part based on this court's reading of pre-*Williams* federal law." It was based *entirely* upon the court's reading of that law. The departure from previous, and genuinely independent state law as developed in *Jones* was justified precisely on federal grounds. Second, the purported justification of *Prudhomme* was to make California law neither more nor less solicitous of the privilege against self-incrimination than was federal law; it was intended to bring California law into accordance with federal law. Third, hidden beneath the use of the word "currently," in the quotation above, is the fact that the California court, in *Prudhomme, just got it wrong*: as very soon interpreted by the United States Supreme Court in *Williams*, the federal self-incrimination privilege *did not* prevent prosecutorial discovery as the court in *Prudhomme* said it did. Fourth, rather than admit this, the court made a reactionary resort to the California Constitution. But, had the court really desired to rely upon the California Constitution, the logical starting point was Justice Traynor's opinion in *Jones*, which was expressly so based. Instead, the court was using the state constitution as a means for retaining its own prior interpretation of the *federal* rule. Finally, exercises in "covering one's tracks," such as in *Reynolds*, are just the sort of thing which has done the greatest damage to the court's authority in the long term.

It would be premature to leave *Reynolds* without noting how it prepared the way for the systematic abolition of prosecutorial

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221. *Id.* at 842-43, 528 P.2d at 49-50, 117 Cal. Rptr. at 441-42 (emphasis added and footnote omitted).

discovery in California. The court accomplished this abolition by acting in the name of judicial restraint--that is, by expressly inviting the state legislature to "create" prosecutorial discovery. In *Reynolds*, the court actually managed to avoid even addressing the content of the trial court's discovery order at all, on the ground that:

> In effect, we would have to create judicially a comprehensive notice-of-alibi procedure for California courts.
>
> We see little to recommend our attempting at once to consider the desirability of creating a notice-of-alibi procedure and to pass objectively on the constitutionality of any such procedure which might result.[222]

In fact, criminal discovery (both by defense and by prosecution) had been overwhelmingly the creation of the courts. As Justice Traynor noted in *Jones*, this was accomplished by exercise of their general rule-making powers.[223] Discovery was therefore an area especially ripe for judicial rule-making in the common law tradition. Furthermore, as the court itself notes in *Reynolds*, other state courts had created such procedures by exercise of their supervisory power over judicial procedure.[224] Nonetheless, Chief Justice Wright, who authored the court's decision declaring the death penalty unconstitutional a couple of years earlier, invokes the constitutional limitations of the court's proper role in government to *cut back* on prosecutorial discovery by saying that the legislature had to authorize it:

> This court has not been vested with formal, quasi-legislative, rule-making power, either by the California Constitution or the Legislature. We accordingly conclude that due regard for this court's function as constitutional adjudicator, and solicitude for this state's governmental scheme of shared legislative and judicial responsibility for the sound

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222. *Id.* at 845, 528 P.2d at 52, 117 Cal. Rptr. at 444 (footnote omitted).
223. *Jones*, 58 Cal. 2d 56, 58-59, 372 P.2d 919, 920-21, 22 Cal. Rptr. 879, 880-81.
224. *Reynolds*, 12 Cal. 3d at 848, 528 P.2d at 54, 117 Cal. Rptr. at 446.

> administration of justice, render it inappropriate for us to create by judicial decision a notice-of-alibi procedure for California courts.[225]

The death knell for prosecutorial discovery came in 1981, with *People v. Collie*,[226] a *tour de force* of judicial activism in the guise of judicial restraint. The court, in an opinion by Justice Mosk, "disapprove[d] of any compelled production of defense evidence absent explicit legislative authorization"[227]--and then warned the legislature against attempting to authorize any such thing. Using the *Reynolds* case to abandon the court's prior jurisprudence, the court sent a strong message to the lower courts to the effect that *Prudhomme*--previously the leading "independent state grounds" case in this area--had fallen into disfavor:

> The theoretical disparities among the courts [of appeal] seem to arise from the dilemma of protecting the privilege, as broadly defined by the *Prudhomme* opinion, while attempting to actualize the *Prudhomme* dictum which appeared to leave some avenues of prosecutorial inquiry open. Unfortunately, the lower courts have given little or no consideration to *Reynolds* . . . [and] have joined in dubious battle over an issue which, like that in *Reynolds*, is more appropriately left to the Legislature for initial consideration.[228]

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225. *Id.* at 849-50, 528 P.2d at 55, 117 Cal. Rptr. at 447 (footnote omitted). Two years after *Reynolds*, the court signalled the coming abolition of prosecutorial discovery in *Allen v. Superior Court*, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976). In that case, an order that both prosecution and defense disclose the names of potential witnesses on the day of commencement of trial was found to violate the California self-incrimination provision. *Id.* at 527, 557 P.2d at 68, 134 Cal. Rptr. 777. In its usual style, the court rewrites the history of the issue a little further by relying upon its already rewritten prior cases:

> In *Reynolds* we noted that "*Prudhomme* put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires." We maintain that solicitude and affirm the continued vitality of the stringent standards set forth in *Prudhomme* for the protection of the privilege against self-incrimination as embodied in article I, section 15 [of the California Constitution].

Id. at 525, 557 P.2d at 67, 134 Cal. Rptr. at 776 (citation omitted). Never mind that *Prudhomme*, which was a federal law case, never mentions article I, and that its primary effect was to cut back upon *Jones*, which really was based upon the California provision. . . .

226. 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981).

227. *Id.* at 48, 634 P.2d at 536, 177 Cal. Rptr. at 460.

228. *Id.* at 53-54, 634 P.2d at 539-40, 177 Cal. Rptr. at 463-64 (footnote omitted). It is noteworthy that the court in *Collie* finally re-discovers that "*Prudhomme* relied largely on federal constitutional principles." *Id.* at 51 n.2, 634 P.2d at 538 n.2, 177 Cal. Rptr. at 462 n.2. Thus, the case

Thus, the court used federal grounds in *Prudhomme* to cut itself loose from the California Constitution, as interpreted in *Jones*. Then it used *Reynolds* to read California law back into *Prudhomme*, creating an "independent state ground" by relying upon a federally-based case. Now, it uses *Collie* to "conceal the evidence" by disowning *Prudhomme*, while embracing *Reynolds*, which had itself expressly relied upon *Prudhomme*. Having, itself, in large measure created criminal discovery for defendants, and having then extended its common law approach to prosecutorial discovery in *Jones*, the court in *Reynolds* decided that it was beyond its proper constitutional role to "create" a single (notice-of-alibi) rule for prosecutorial discovery, even though a rule of prosecutorial discovery had already been adopted in *Jones*.

We have seen that the court justified these restrictions upon prosecutorial discovery by leaving this area "up to the Legislature." This could have been a risky move, however, because the legislature might do what it had been invited to do. So, in the course of attempting to abolish prosecutorial discovery, Justice Mosk in *Collie*, though he uses the same tack as *Reynolds*--that judicial restraint requires that the task be left to legislators--also attempts to minimize the chances that the legislature will act to overrule *Collie* by warning them against it:

> In recognizing the original primacy of the Legislature in the field of creating rules of criminal procedure,[229] we are not unmindful of the almost insurmountable hurdles likely to thwart any attempts to devise constitutionally permissible discovery rules applicable to defendant or defense material.[230]

This is followed by a litany of alleged federal and state constitutional horrors which might be found to have occurred if the

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upon which the court constructed its doctrine was consigned to the back bench, at least temporarily.

229. This is a pretty remarkable claim in light of all the court had done in previous years, with regard to the death penalty, the exclusionary rule, etc.

230. *Collie*, 30 Cal. 3d at 54, 634 P.2d at 540, 177 Cal. Rptr. at 464 (footnote added).

legislature were ever rash enough to venture into this area.[231] As Justice Richardson remarked in his dissent:

> [L]est prosecutorial discovery actually receive legislative attention, the majority . . . fearfully warns that the development of constitutionally permissible rules faces "almost insurmountable hurdles," because the proper standards are "unavoidably shrouded in constitutional doubt," and involve "monumental complexity." The majority then cautions "we have grave doubts that a valid discovery rule affecting criminal defendants can be devised." The clear message to the legislature is "It's up to you, but don't try it."[232]

The legislature did try it. In 1982, it enacted Penal Code section 1102.5, which provided for prosecutorial discovery of statements by defense witnesses (other than the defendant) after they had testified on direct examination. The court, with Justice Mosk again writing for the majority, held section 1102.5 unconstitutional in *In re Misener*,[233] decided three years later. We will not belabor the argument in *Misener* since it follows very much in the line of the previous cases in this area, with some historical reinterpretations.[234]

In any case, *Misener* was less about constitutional law than it was about constitutional power: Would control of criminal discovery be in the hands of the legislature, or of the supreme court? Notwithstanding its previous, abnegatory avowals of judicial restraint in *Reynolds* and *Collie*, the court in *Misener* kept control of this area of law for itself. Having found that the legislature had "r[i]s[en] to the challenge" when it passed section 1102.5, the

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231. *Id.* at 54-55, 634 P.2d at 540-41, 177 Cal. Rptr. at 464-65.

232. *Id.* at 66, 634 P.2d at 547, 177 Cal. Rptr. at 471 (Richardson, J., concurring and dissenting) (citations omitted).

233. 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985).

234. Just to cite a couple of instances, *Prudhomme* once again "rests entirely on state, not federal, grounds," *id.* at 558, 698 P.2d at 647, 213 Cal. Rptr. at 579--whereas in *Collie*, "*Prudhomme* relied largely on federal constitutional principles." *Collie*, 30 Cal. 3d at 51 n.2, 634 P.2d at 538 n.2, 177 Cal. Rptr. at 462 n.2. Also, according to the *Misener* majority, *Reynolds* held that the order in that case "was unconstitutional under *Wardius* because it was not reciprocal." *Misener*, 38 Cal. 3d at 549, 698 P.2d at 641, 213 Cal. Rptr. at 573. Actually, *Reynolds* expressly declined to so hold, on the basis that that area of law was more appropriately in the domain of the legislature. *See* Wardius v. Oregon, 412 U.S. 470 (1973). *See also supra* text accompanying notes 224-225.

majority set about speaking "the last word on the subject," by effectively abolishing prosecutorial discovery in California on the grounds that it violated the self-incrimination clause of the Declaration of Rights.[235]

In fact, *Misener* was *not* the last word on the subject. On the contrary, it was itself quickly rendered virtually a dead letter. Three of the five member majority in *Misener*--Chief Justice Bird, and Justices Grodin and Reynoso--were voted out of office in 1986. The new majority of the court quickly set about obviating the *Misener* rule, by applying harmless error analysis to subsequent cases involving section 1102.5.[236] As a result, even in cases in which the provisions of section 1102.5 were expressly applied, the court affirmed the conviction, with the simple (if not necessarily convincing) finding that the error had been "harmless."

Then, in 1990, the voters passed Proposition 115, which amended article I of the Declaration of Rights to add section 30(c), which provides that:

> In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process.[237]

The proposition also added statutory provisions to implement this system of "reciprocal discovery." In August, 1991, in *Izazaga v. Superior Court*,[238] the California Supreme Court (in an opinion authored by the Chief Justice) held "that, . . . the discovery provisions of Proposition 115 are valid under the state and federal Constitutions, and that Proposition 115 effectively reopened the two-way street of reciprocal discovery in criminal cases in

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235. *Misener*, 38 Cal. 3d at 558, 698 P.2d at 648, 213 Cal. Rptr. at 580.

236. *See* People v. Wright, 52 Cal. 3d 367, 421-22, 802 P.2d 221, 256-57, 276 Cal. Rptr. 731, 766-67 (1990); People v. Hunter, 49 Cal. 3d 957, 970, 782 P.2d 608, 614, 264 Cal. Rptr. 367, 373 (1989); People v. Robbins, 45 Cal. 3d 867, 882, 755 P.2d 355, 364, 248 Cal. Rptr. 172, 180 (1988) (finding any *Misener* error to be harmless). *See also* People v. Rich, 45 Cal. 3d 1036, 1086-87, 755 P.2d 960, 991-92, 248 Cal. Rptr. 510, 541-42 (1988) (finding no *Misener* error).

237. CAL. CONST. art. I, § 30(c).

238. 54 Cal. 3d 356, 815 P.2d 304, 285 Cal. Rptr. 231 (1991).

California."[239] Although the court did not acknowledge the fact, this decision essentially abrogated the whole line of cases from *Prudhomme* to *Misener*. Justice Mosk, having been the author of many of the opinions which were so abrogated, lodged a long dissent.

In sum, as of this writing, the jurisprudence of "independent state grounds," as developed by the California Supreme Court beginning in the early 1970's and continued aggressively until at least January of 1987, lies in shards. Meanwhile, what one scholar has referred to as "amendomania"[240] has been loosed upon the land. Given the considerable damage this whole experience has inflicted upon our state's judiciary and other institutions, one ought at least to attempt to salvage some positive lessons from this journey of the last two decades.

CONCLUSION: A CAUTIONARY TALE

The role of the judiciary--and, especially, of appellate judges--in a democracy is difficult and profoundly ambivalent: Judges must be politic, without succumbing to politics; they must be principled without being driven by merely personal principles; they must root their opinions in history--*real history*--without themselves becoming its slaves. Above all, they must not be "result oriented," but they must be acutely oriented to the Great Result of their endeavor--the protection and strengthening of democratic government and its institutions of justice. As the late Professor Alexander Bickel observed (speaking of the United States Supreme Court) in his final book, *The Morality of Consent*:

> [J]udges, themselves abstracted from, removed from political institutions by several orders of magnitude, ought never to impose an answer on the society merely because it seems prudent and wise to them personally, or because they believe that an answer -- always provisional -- arrived at by the political institutions is foolish. . . .

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239. *Id.* at 363, 815 P.2d at 308, 285 Cal. Rptr. at 235.

240. *See* Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984).

> Yet in the end, and even if infrequently, we do expect the Court to give us principle. . . . Confined to a profession, the explication of principle is disciplined, imposing standards of analytical candor, rigor, and clarity. The Court is to reason, not feel, to explain and justify principles it pronounces to the last possible rational decimal point. It may not itself generate values, out of the stomach, but must seek to relate them -- at least analogically -- to judgments of history and moral philosophy.[241]

Taken together, the disciplined "explication of principle" and the accompanying moral authority of its decisions are the blood and sinews of the judiciary--and therefore of our legal system. If courts fail in these tasks--or even if the great body of opinion in the community concludes that they have failed--the results can be as destructive as they are insidious: the incremental undermining and weakening of government by law, and the corrosion of the ability of the judiciary to persuade and of its moral authority to cajole. "Possessed of neither the purse nor the sword, the power and influence of . . . [a] Court are in direct proportion to the respect which its decisions command."[242]

* * *

Too often in recent decades, these values have been depreciated and consequently diminished by our California Supreme Court. Sometimes, as in the *Hawkins* case, this was done more or less expressly: the text, origins, subsequent history, and present political realities were ignored in a manner such as few elected officials would have dared contemplate. Other times, as in *Anderson*, the court would make incomplete or unconvincing ventures into textual and historical analysis, only to reach textually and historically insupportable conclusions. But most often, as in the independent state grounds cases (such as in *Brisendine* and *Reynolds*) discussed above, the court embraced an obsolete federal doctrine and justified

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241. A. BICKEL, *supra* note 145, at 26.

242. In re Roger S., 19 Cal. 3d 921, 946, 569 P.2d 1286, 1302, 141 Cal. Rptr. 298, 314 (1977) (Clark, J., dissenting) (attributing this language to "the Attorney General").

this departure from applicable federal law[243] as an "independent" interpretation of a provision of the California Constitution--which provision was almost always virtually identical to the parallel provision of the federal constitution. Because the language of the state and federal provisions was so similar, efforts to justify these "independent" interpretations based on the text itself were doomed from the outset. Moreover, efforts--such as in *Disbrow* or in *Houston*--to justify these "independent" doctrines historically were, as we discuss above in Part I, erroneous. On this foundation of sand, the court would then build an edifice of its own, largely constructed from misreadings of its own past jurisprudence. Rarely do these cases manifest any sensitivity to the political circumstances surrounding them; still less do they demonstrate that the court was seeking to respond to the concerns of Californians generally.

Over a decade ago, Professor Preble Stolz of the Boalt Hall Law School concluded his book, *Judging Judges*, regarding the controversies then swirling around the California high court, with the following, prescient observations:

> Recognizing that judicial power is always threatened by some exercise of majoritarian power is debilitating only if the justices believe they have a mandate to govern by virtue of their office. Phrased differently, trimming is a problem only if there is a program to be diluted. If the court has no program beyond fair process and if its fundamental principle is to do its best to understand, articulate, and promote the policy preferences of others, then judicial power should endure despite the ambiguities inherent in the justices' high office.
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> Ultimately the issue is whether the California justices are willing to accept this limited vision of their function.[244]

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243. This is not to deny that there were some instances in which the federal High Court provoked such resistance from other courts, by departing from its own prior jurisprudence with insufficient circumspection. But that is another subject.

244. P. STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT 427 (1981).

Professor Stolz published these words in 1981, in the wake of the voters' rejection of the *Anderson* decision, the narrow victory of then-Chief Justice Rose Bird in the judicial retention election of 1978, and the subsequent, bruising public inquiry into alleged wrong-doings in connection with that election.[245] Unfortunately, the court as a whole did not take Professor Stolz's counsel to heart. It continued to act in the imperial mode, and the people of this state have responded accordingly. Proposition 8 wiped out a major portion of the court's criminal jurisprudence. Then, the voters turned out almost half of the court in the elections of 1986. This was followed in 1990 by Proposition 115, which amounted to an extraordinary vote of lack of confidence in the court. Section 24 of Proposition 115 would have essentially gutted the remainder of the court's constitutional authority over criminal procedure.

As noted above, the court avoided this result by ruling in *Raven v. Deukmejian* that section 24 amounted to an invalid "revision" of the state constitution. However, the court in *Raven* also made a salutary departure from the practice of the "independent state grounds" era. It relied upon a genuinely unique provision of the California Constitution which it read to mean more or less what it said.[246] Furthermore, it has not resisted Proposition 115 as it did Proposition 8.[247] So, it may be that the court has rounded the corner. If true, we may look forward to a period of healing and general reconstruction of the bond between the court and the people of this state.

There can be no better or more important place to start such a reconstruction than with the California Declaration of Rights. But the starting point for the development of a genuinely "independent" and "vital" Declaration must be the understanding of and respect for the text and history of that document. This in turn requires a mature appreciation that there are provisions which are emphatically unique, or at least non-federal in origin and intent,

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245. *Id. passim.*

246. Raven v. Deukmejian, 52 Cal. 3d 336, 349-50, 801 P.2d 1077, 1085-86, 276 Cal. Rptr. 326, 334-35 (1990) (citing CAL. CONST. art. XVIII, §§ 1-3).

247. *See, e.g.*, Tapia v. Superior Court, 53 Cal. 3d 282, 299, 807 P.2d 434, 444, 279 Cal. Rptr. 592, 602-03 (1991) (holding Proposition 115 to be generally retroactive).

but that there are also provisions--especially the criminal procedure provisions--which definitely are *not* independent of the federal Model. As we have shown in Part I above, the latter were consciously taken from the federal constitution and were incorporated into our state Declaration in order to secure those federal rights for Californians. Furthermore, if anything positive is to emerge from the events of the past couple of decades discussed in Part II, it ought to be an appreciation that the people of this state wish to see those provisions interpreted, as a general matter, in a manner which reflects their origins: that is, federally. If the text and history of a provision are federal, then taking that text and history seriously--and in a manner that ordinary people can understand--means regarding the precedents of the United States Supreme Court as persuasive authority. In the words of Justice Richardson:

> "The interests of uniformity in the development of basic principles of constitutional law involving . . . rights which are expressed in identical terms in state and federal constitutions, together with the deference that is due the pronouncements of the Supreme Court of the United States, indicate that we should chart a separate course only where compelling reasons for doing so are advanced."[248]

On the other hand, with regard to provisions which are unique to the California Constitution, or which come from other states, etc., it is all the more important that the California Supreme Court (and lower courts interpreting such provisions) carefully anchor their interpretations in the text and history of those provisions. This requires close reading of the text and doing the scholarship necessary to recover the text's "usable past," in accordance with long-standing traditions of legal interpretation. The result of this inquiry may be that the California provision is either broader, or narrower, than the protection provided by federal law--or, it may be broader in some respects and narrower in others. Whatever the

248. People v. Disbrow, 16 Cal. 3d 101, 129, 545 P.2d 272, 291, 127 Cal. Rptr. 360, 379 (emphasis omitted) (footnote omitted in original) (quoting Justice Pomeroy of the Pennsylvania Supreme Court in Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975)).

results of this inquiry, the court's guiding principle in developing the Declaration should be first of all to do no harm to the democratic process of this state. On this basis the California Declaration of Rights can become the generator of consensus and the foundation for a genuinely vital and independent state constitutional jurisprudence.

THE PROVENANCE[a] AND FATE OF THE PROVISIONS OF

Text of the 1849 Declaration[b]	Provenance
Sec. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty: acquiring, possessing and protecting property: and pursuing and obtaining safety and happiness.	*[1] The Iowa Constitution of 1846, art. I, § 1.*[c]
Sec. 2. [1] All political power is inherent in the people. *[2]* Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it.	*[2] The Iowa Constitution of 1846, art. I, § 2, with a change reflected in the manuscript of the Original California Constitution. (This change consisted of the elimination of the words "at all times," after "right" in clause [2].)*[d]

a. By provenance, we emphasize that we are not speaking of the ultimate origins of the language of the various provisions. *See supra* note 7. Rather, we are concerned with those documents from which the language in question was, in all likelihood, consciously adopted or adapted. Those interested in state constitutions with provisions similar to those of California (at least as regards the 1879 constitution) are referred, as a starting point, to DESTY, *supra*, note 12, *passim*.

b. The text reproduced below is that from the facsimile draft of THE ORIGINAL CONSTITUTION. *See supra,* at note 30. The clause designations placed in brackets are for purposes of convenience only.

c. As with many other civil law provisions, the general language of this section was common to other state constitutions. *See, e.g.*, MAINE CONST. 1820, art. I, § 1; FLA. CONST., 1838, art. I, § 1; and especially the Virginia Bill of Rights, 1776, § 1.

d. This language was also common to state constitutions of the time. *See, e.g.*, CONN. CONST., 1818, art. I, § 2; MICH. CONST., 1835, art. I, § 2; *see also*, MASS. CONST., 1780, Part I, art. I.

THE CALIFORNIA DECLARATION OF RIGHTS OF 1849

Subsequent History	Parallel Language in the Present (1992) Declaration[e]
[1] Remains § 1 of the present Declaration, except that "and privacy" was added by popular initiative in 1972.	*[1]* All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. *[present § 1]*
[2] This section remains essentially the same, except that in 1976 it was moved to art. II, § 1.	*[2]* All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require. *[present art. II, § 1]*

e. Unless otherwise noted, the bracketed references to the present section of the California Constitution are to article I, the Declaration of Rights. Because considerable changes were made to sections 3 and 8 of the 1849 Declaration at the constitutional convention of 1878-1879, we also reproduce below the language in the present Declaration which derive from the changes made to the Declaration in 1879.

Text of the 1849 Declaration	Provenance
Sec. 3. [1a] The right of trial by jury shall be secured to all, *[1b]* and remain inviolate forever; *[2]* but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.	*[3] The origin of clause [1a] is unknown and may be original to California. Clauses [1b][f] and [2] are from the New York Constitution of 1846, article I, § 2.*
Sec. 4. [1] The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state: *[2]* and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; *[3]* but the liberty of conscience, hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.	*[4] The section comes from the 1846 N.Y. Constitution, art. I, § 3, with a deletion (of the words "to all mankind" after "state" in clause [1]) reflected in the Original Cal. Constitution; clauses [1] and [3] were taken from the N.Y. Constitution of 1777 via art. VII, § 3 of the N.Y. Constitution of 1821.*
Sec. 5. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.	*[5] The drafters worked from art. I, § 4 of the N.Y. Constitution of 1846, taken from art. VII, § 6 of the 1821 N.Y. Constitution; but the archetype for the section was the U.S. Constitution, art. I, § 9[2].*[g]

f. The "inviolate" right to trial by jury was often guaranteed by 19th century state constitutions. *See, e.g.*, ALA. CONST., 1819, Art.I, § 28; ILL. CONST., 1818, Art. VIII, § 6.

g. *See supra* part I.D.3.

Subsequent History	Parallel Language in the Present (1992) Declaration
[3] This section was the subject of considerable controversy at the convention of 1878-1879.[h] *As a result, clause [2] of the 1849 Declaration was replaced in § 7 of the 1879 Declaration with the following: "but in civil actions three fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, not amounting to felony, by the consent of both parties, expressed in open Court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions, and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open Court." (Clauses [1a] and [1b] remain today with stylistic changes.) It was amended in lesser respects in 1928, again in 1974, and once again in 1980.*	*[3]* Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute. *[¶]* In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in municipal or justice court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court. *[¶]* In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. *[present § 16]*
[4] Remains § 4 of the present Declaration; in 1879, "allowed" was changed to "guaranteed" in clause [1] and "or juror" was added after "witness" in clause [2]; in 1974, stylistic changes reorganized the section somewhat.	*[4]* Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion. *[¶]* A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs. *[present § 4]*
[5] Except that it is now § 11 of the Declaration, this section remains the same, with stylistic changes made in 1974.	*[5]* Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion. *[present § 11]*

h. *See supra* part I.E.1.

Text of the 1849 Declaration	Provenance
Sec. 6. [1a] Excessive bail shall not be required, *[1b]* nor excessive fines imposed, *[2]* nor shall cruel or unusual punishments be inflicted, *[3]* nor shall witnesses be unreasonably detained.	*[6] Clauses [1] through [3] are from the N.Y. Constitution of 1846, art. I, § 5, with one emendation in the original California Constitution*[1]*; but the archetype of clauses [1] and [2] was the U.S. Constitution, Amend. VIII.*
Sec. 7. All persons shall be bailable, by sufficient sureties: unless for capital offenses, when the proof is evident or the presumption great.	*[7] The exemplar was the Iowa Constitution of 1846, art. I, § 12[2], except that "before conviction" was removed after "shall," and "when" substituted for "where." That language in turn comes from the Northwest Ordinance of 1787, art. II.*

1. *See supra* Part I.D.5.a. *See also, e.g.*, FLA. CONST., 1838, art. I, § 12; MD. CONST., 1776, art. I, § 22.

Subsequent History	Parallel Language in the Present (1992) Declaration
[6] §§ 6 and 7 of the 1849 Declaration were combined in section 6 of the Declaration of the 1879 constitution. The language taken from § 6 of the 1849 document was also amended to add, "nor confined in any room where criminals are actually imprisoned," after "detained." In 1974, this added phrase was removed on grounds of obsolescence. At the same time, the clauses originally embodied in § 6 of the 1849 Declaration were split up into several different sections, as reflected in the column at right.	*[6]* Excessive bail may not be required. *[present § 12, ¶ 2]* Cruel or unusual punishment may not be inflicted or excessive fines imposed. *[present § 17]* Witnesses may not be unreasonably detained. *[present § 10[1]]*
[7] §§ 6 and 7 of the 1849 Declaration were combined in § 6 of the Declaration of the 1879 Constitution. The language taken from § 7 was taken over verbatim and remains with only stylistic changes in § 12(a). However, in 1982, § 12(b) and (c) were added by popular initiative, the effect of which was to further limit the availability of bail in cases where there is "clear and convincing evidence" of a "substantial likelihood" of bodily harm to others. This 1982 amendment effectively overruled the California Supreme Court's decision in In re Underwood, *9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).*	*[7]* A person shall be released on bail by sufficient sureties, except for: (a) Capital crimes when the facts are evident or the presumption great . . . . *[present § 12(a)]*

Text of the 1849 Declaration	Provenance
Sec. 8. [1] No person shall be held to answer for a capital or otherwise infamous crime *[2]* (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny under the regulation of the legislature) *[3]* unless on presentment or indictment of a grand jury; *[4]* and in any trial in any court whatever; the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions. *[5]* No person shall be subject to be twice put in jeopardy for the same offence; *[6]* nor shall he be compelled, in any criminal case, to be a witness against himself, *[7]* nor be deprived of life, liberty, or property, without due process of law; *[8]* nor shall private property be taken for public use without just compensation.	*[8] The N.Y. Constitution of 1846, art. I, § 6; clause [4] was taken largely from the N.Y. Constitution of 1821, art. VII, § 7; but, the archetype of clauses [1], [3] and [5] through [8] was the U.S. Constitution, Amend. V.*

Subsequent History	Parallel Language in the Present (1992) Declaration
[8] As a result of the controversy over the grand jury system[j], the convention of 1878-1879 replaced clauses [1] through [3] of the 1849 Declaration with the following language in new § 8 of the 1879 Declaration, set forth in the margin.[k] Clause [8] was moved to § 14 in 1879. The remaining language from § 8 (clauses [4] through [7]) of the 1849 Declaration was moved to § 13 of the 1879 document, and new language guaranteeing a speedy and public trial and providing for witness depositions was added.[l] § 13 of the 1879 Declaration is set forth in the margin.[m] The eminent domain clause was moved and amended several times between 1879 and the present.	*[8]* The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel. [¶] Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law. *[present § 15]* A person may not be deprived of life, liberty, or property without due process of law. . . . *[from present § 7]* Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. . . . *[from present § 19]*

j. *See supra* part I.E.2.

k. Section 8 of the 1879 Declaration read: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

l. *See supra* Part I.D.1.

m. Section 13 of the 1879 Declaration read: "In criminal prosecutions, in any Court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the Court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide, when there is reason to believe that the witness, from inability or other causes, will not attend at the trial."

Text of the 1849 Declaration	Provenance
Sec. 9. [1] Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; *[2]* and no law shall be passed to restrain or abridge the liberty of speech or of the press. *[3]* In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted: and the jury shall have the right to determine the law and the fact.	*[9] The N.Y. Constitution of 1846, art. I, § 8, which was taken from the N.Y. Constitution of 1821, art. VII, § 8.*
Sec. 10. The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.	*[10] The Iowa Constitution of 1846, art. I, § 20, with a few emendations.*
Sec. 11. All laws of a general nature shall have a uniform operation.	*[11] The Iowa Constitution of 1846, art. I, § 6.*
Sec. 12. [1] The military shall be subordinate to the civil power. *[2]* No standing army shall be kept up by this state in time of peace; *[3]* and in time of war no appropriation for a standing army shall be for a longer time than two years.	*[12] With a single stylistic exception, this comes in haec verba from the Iowa Constitution of 1846, art. I, § 14.*
Sec. 13. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, except in the manner to be prescribed by law.	*[13] This section comes in haec verba from the Iowa Constitution of 1846, art. I, § 15. (Similarity of language suggests that the archetype for the language was the U.S. Constitution, Amend. III).*

Subsequent History	Parallel Language in the Present (1992) Declaration
[9] The language of § 9 was retained in the 1879 Declaration, with some additional language providing for venue in libel cases. This language in turn remained substantially unchanged until the revisions of 1974. At that time, clauses [1] and [2] (from the 1849 Declaration) were left unchanged, except that "citizen" was changed to "person." (The Revision Commission also removed the language of clause [3], on the grounds that its specificity made it more appropriate for statutory embodiment.)	[9] Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. *[present § 2(a)]*
[10] Embodied in § 3 of the present Declaration, with stylistic changes made in 1974.	[10] The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. *[present § 3]*
[11] The language of this section remains essentially unchanged, except that it is now embodied in art. IV, § 16(a).	[11] All laws of a general nature have uniform operation. *[present art. IV, § 16(a)]*
[12] The language of §§ 12 and 13 of the 1849 Declaration was combined in § 12 of the Declaration in the Constitution of 1879, except that the language of clause [3] of § 12 of the 1849 document was eliminated. As consolidated in the 1879 Declaration, the language remains today essentially unchanged; it is now set forth in § 5 of the present Declaration.	[12] The military is subordinate to civil power. A standing army may not be maintained in peacetime. *[present § 5[1]]*
[13] The language of § 13 of the 1849 Declaration was combined with most of the language from § 12, into § 12 of the Declaration in the Constitution of 1879. That language, now set forth in § 5, remains essentially unchanged.	[13] Soldiers may not be quartered in any house in wartime except as prescribed by law, or in peacetime without the owner's consent. *[present § 5[2]]*

Text of the 1849 Declaration	Provenance
Sec. 14. Representation shall be apportioned according to population.	*[14] The provenance of this section, simple though it may be, is unknown; it may be original to the California Constitution*[n]
Sec. 15. No person shall be imprisoned for debt, in any civil action on *mesne* or final process, unless in cases of fraud: and no person shall be imprisoned for a militia fine in time of peace.	*[15] With a minor stylistic exception, this comes in haec verba from the Iowa Constitution of 1846, art. I, § 19.*
Sec. 16. No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed.	*[16] The ostensible source was the Iowa Constitution of 1846, art. I, § 21; but, the archetype was the U.S. Constitution, art. I, §§ 9[3] and 10[1].*[o]
Sec. 17. Foreigners who are, or who may hereafter become, *bona fide* residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native born citizens.	*[17] This section comes from the Iowa Constitution, art. I, § 22, with some emendations: "bona fide" was inserted before "residents," and "inheritance" was substituted for "descent."*
Sec. 18. Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state.	*[18] The Iowa Constitution of 1846, art. I, § 23; but the archetype for that language was the federal Northwest Ordinance of 1787, art. VI.*

n. Professor Fritz, *supra* at note 13, at 24, has cited as the source of this provision the Iowa Constitution of 1846, but no such language appears in that document. More interesting is the suggestion by Hansen in SEARCH FOR AUTHORITY, *supra* note 64, at 113, who points to the Mexican *Acta Constitutiva of 1823-24*, which certainly may have been familiar to the Spanish-speaking "Californians" of the constitutional delegation. The general concept of representation according to population does appear in the *Acta Constitutiva*. *See* COECCION DE LAS LEYES FUNDAMENTALES (1857) at 118 (art. 12 under "Poder legislativo") and F.T. RAMIREZ, LEYES FUNDAMENTALES DE MEXICO, 1808-1975 (1975) at 155 (same); however, comparison of the language of the *Acta Constitutiva* with that of the official, Spanish translation of the 1849 constitution reveals almost no similarity of wording. So, although some general inspiration may come from the *Acta Constitutiva*, it cannot be said that the language of the California 1849 Constitution was adopted from the *Acta Constitutiva*. *See* THE ORIGINAL CONSTITUTION, *supra*, note 30 at 15 (containing the Spanish version of the relevant language from the 1849 constitution).

o. *See supra* part I.D.4.

Subsequent History	Parallel Language in the Present (1992) Declaration
[14] This section was apparently abolished by the convention of 1879, and so there is no direct successor to it.	
[15] In 1879, the following language was added after "fraud": "nor in civil actions for torts, except in cases of willful injury to person or property. . . ." The present language was adopted in 1974.	*[15]* A person may not be imprisoned in a civil action for debt or tort, or in peacetime for a militia fine. *[present § 10[2]]*
[16] Embodied in § 9 of the present Declaration, with stylistic changes made in 1974.	*[16]* A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed. *[present § 9]*
[17] This section has had an eventful and disturbing history. In 1879, the section was amended so as to discriminate against persons of Asian origin.[p] *The section was amended again in 1894 and yet again in 1954. The latter amendment removed language expressly addressed to race but retained disabilities applicable to foreigners. The present language, adopted in the revision of 1974 is the simplest and most expansive in the section's history.*	*[17]* Noncitizens have the same property rights as citizens. *[present § 20]*
[18] Embodied in § 6 of the present Declaration, with stylistic changes made in 1974.	*[18]* Slavery is prohibited. Involuntary servitude is prohibited except to punish crime. *[present § 6]*

p. *See* Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L.Q. 35 (1989).

Text of the 1849 Declaration	Provenance
Sec. 19. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the places to be searched, and the persons and things to be seized.	*[19] The ostensible source was the Iowa Constitution of 1846, art. I, § 8; but, the archetype was the U.S. Constitution, Amend. IV.*[q]
Sec. 20. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.	*[20] The ostensible source was the Iowa Constitution of 1846, art. I, § 16: the archetype was the U.S. Constitution, art. III, § 3[1].*[r]
Sec. 21. This enumeration of rights shall not be construed to impair or deny others, retained by the people.	*[21] This section comes in haec verba from the Iowa Constitution of 1846, art. I, § 25.*

q. *See supra* part I.D.2.
r. *See supra* part I.D.6.

Subsequent History	Parallel Language in the Present (1992) Declaration
[19] Embodied in § 13 of the present Declaration, with stylistic changes made in 1974.	*[19]* The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. *[present § 13]*
[20] Embodied in § 18 of the present Declaration, with stylistic changes made in 1974.	*[20]* Treason against the State consists only in levying war against it, adhering to its enemies, or giving them aid and comfort. A person may not be convicted of treason except on the evidence of two witnesses to the same overt act or by confession in open court. *[present § 18]*
[21] Embodied in the last clause of § 24 of the present Declaration, with stylistic changes made in 1974.	*[21]* This declaration of rights may not be construed to impair or deny others retained by the people. *[present § 24, last clause]*